FILED
MAR 4 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1252

DONALD L. WAMP, CARL L. GIBSON, SHERMAN L. PAUL and MOCCASIN BEND ASSOCIATION,
Petitioners,

vs.

CHATTANOOGA HOUSING AUTHORITY, CITY OF CHATTANOOGA, TENNESSEE, CAMERON-OXFORD ASSOCIATES, ADVANCE MORTGAGE CORPORATION, MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., THE UNITED STATES OF AMERICA EX REL. THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also EX REL. THE FEDERAL HOUSING ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD P. JAHN
TANNER & JAHN
1223 Volunteer Building
Chattanooga, Tennessee 37402
615-756-8473
Counsel for Petitioners

March 3, 1976

E. L. Mendenhall, Inc., 926 Cherry St., Kansas City, Mo. 64106, 816-421-3030

BLEED THROUGH

TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 5

Statement of Facts 7

Reasons for Granting the Writ—

I. Petitioners Did Have the Necessary Standing to Sue 19

A. The Controlling Tennessee Decisions Were Erroneously Applied by the Lower Federal Courts 19

B. Where Federal Rights Are Asserted in a State Court Proceeding, Federal Decisions Control Standing to Sue 23

C. Petitioners Sustained Sufficient "Injury in Fact" to Meet Federal Standing to Sue Requirements 27

D. The NEPA Issue Which Petitioners Sought to Raise by Timely Amendment After Removal of the Cause to the Federal District Court Should Have Been Considered a Part of Their Complaint When Determining Their Standing to Sue 28

II. The Failure to Resubmit the Cameron Hill Project for Public Bidding in 1973 Violated the Federal Housing Act and the Tennessee Housing Authority Act As Well As the General Law on Public Contracts With the Result That the Deed of Cameron Hill to Cameron-Oxford Associates Was Void 31

Conclusion 36

Appendix—

Opinion of the United States District Court for the Eastern District of Tennessee A1

Judgment of Dismissal, United States District Court for the Eastern District of Tennessee ... A13

Opinion of the United States Court of Appeals for the Sixth Circuit A15

Judgment, United States Court of Appeals for the Sixth Circuit A18

Table of Authorities

Cases

Alaska State Housing Authority v. *Contento*, (Alaska Sup. Ct. 1967) 432 P. 2d 117 26

Badgett v. *Rogers*, 222 Tenn. 374, 436 S.W. 2d 292 (1969) 20

Bennett v. *Stutts*, 521 S.W. 2d 575 (Tenn. 1975) 21, 22

Brown v. *Mt. Vernon Housing Auth.*, (1952) 279 App. Div. 795, 109 N.Y.S. 2d 392 35

Burns v. *City of Nashville*, 142 Tenn. 541, 221 S.W. 828 (1919) 20

Calvert Cliffs' Coordinating Comm. v. *Atomic Energy Commission*, 449 F. 2d 1109 (D.C. Cir. 1971) 30

Chesapeake & O. R. Co. v. *Martin*, 283 U.S. 209 26

City of Buffalo v. *Mollenberg-Betz Machine Co.*, 279 N.Y.S. 2d 842 26

Environmental Defense Fund v. *Tennessee Valley Auth.*, 468 F. 2d 1164 (C.A. 6, 1972) 30

Goose Hollow Foothills League v. *Romney*, 334 F. Supp. 877 (1971) 30

BLEED THROUGH

Green Street Association v. *Daley*, (C.A. 7, 1967) 373 F. 2d 1 26

Grubb v. *Public Utilities Commission of Ohio*, (Ohio 1930) 50 S. Ct. 374, 281 U.S. 470, 74 L. Ed. 972 25

Hanly v. *Kleindienst*, 471 F. 2d 823 (2d Cir. 1972) 31

Hanly v. *Mitchell*, 460 F. 2d 640 (2d Cir. 1972) ... 31

Holiday Magic, Inc. v. *Warren*, 357 F. Supp. 20 (D.C. Wis. 1973) 26

Mid Continent Pipe Line Co. v. *Hargrave*, 129 F. 2d 655 (C.A. Okl. 1942) 26

Missouri v. *Taylor*, (Mo. 1924) 45 S. Ct. 47, 226 U.S. 200, 69 L. Ed. 247 25

Missouri Pac. R. Co. v. *Fitzgerald*, (Neb. 1896) 16 S. Ct. 389, 160 U.S. 556, 40 L. Ed. 536 25

Pittman Const. Co. v. *Housing Authority of Opelousas*, (W.D. La. 1958) 167 F. Supp. 517 35

Sierra Club v. *Morton*, (1972) 405 U.S. 727, 31 L. Ed. 2d 636, 92 S. Ct. 1361 .....23, 27, 28, 31

Silva v. *Romney* (*Lynn*), 342 F. Supp. 783 (D.C. Mass., April 13, 1972); 482 F. 2d 1282 (C.A. 1, July 5, 1973) 30

Town of Brookline v. *Brookline Development Authority*, (Mass. Sup. Jud. Ct. 1962) 183 N.E. 2d 484 26

U. S. v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), (1973) 412 U.S. 669, 37 L. Ed. 2d 254, 93 S. Ct. 2405 .....23, 27, 28, 31

TEXTS AND STATUTES

20 Am. Jur. 2d, *Courts*, § 226 26

56 Am. Jur. 2d, *Municipal Corporations*, §§ 504, 554 35

64 Am. Jur. 2d, *Public Works and Contracts*, §§ 58, 66, 80 ..... 32, 33
Federal Housing Act (42 U.S.C.A. § 1441, et seq.) 5, 26
42 U.S.C. § 1455 5
National Environmental Policy Act (42 U.S.C. § 4321, et seq.) 3, 15, 26
42 U.S.C. § 4332(C) 3
Tennessee Housing Authority Act, T.C.A. § 13-821 6
28 U.S.C. § 1254(1) 2

MISCELLANEOUS

1971 CEQ Guideline, Section 11 (17 ALR Fed. 33 at 49-50) 30
"HUD And The Human Environment; A Preliminary Analysis Of The Impact Of The National Environmental Policy Act of 1969 Upon The Department of Housing And Urban Development," 58 *Iowa Law Review* 805-890 30
HUD's Urban Renewal Handbook, Chapter 1, Section 1 (*RHM 7214.1*) 34

BLEED THROUGH

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

DONALD L. WAMP, CARL L. GIBSON, SHERMAN L. PAUL and MOCCASIN BEND ASSOCIATION,
Petitioners,

vs.

CHATTANOOGA HOUSING AUTHORITY, CITY OF CHATTANOOGA, TENNESSEE, CAMERON-OXFORD ASSOCIATES, ADVANCE MORTGAGE CORPORATION, MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., THE UNITED STATES OF AMERICA EX REL. THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also EX REL. THE FEDERAL HOUSING ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Donald L. Wamp, Carl L. Gibson, Sherman L. Paul and Moccasin Bend Association, a Tennessee nonprofit corporation, pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Sixth Circuit, rendered in

these proceedings on December 5, 1975, which affirmed the dismissal of petitioners' suit by the United States District Court for the Eastern District of Tennessee, on the ground that petitioners had no standing to sue.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Tennessee is reported at 384 F. Supp. 251 and is set forth at pages A1-A12 hereinafter. The opinion of the United States Court of Appeals for the Sixth Circuit is not reported and is set forth at pages A15-A19 hereinafter.

JURISDICTION

The decision rendered by the United States Court of Appeals for the Sixth Circuit was filed December 5, 1975. This petition for certiorari was filed less than 90 days after that date. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioners sought to enjoin the construction of a federally subsidized apartment complex upon Cameron Hill, a substantial local landmark within an urban renewal project immediately adjacent to downtown Chattanooga, Tennessee. They further sought cancellation of the deeds and contracts between the developer and the government agencies involved, and the compelling of a reevaluation, resolicitation and redisposition of the Cameron Hill tract (A1-A2[1]). The lawsuit was filed in

---

1. Page references followed by the letter "A" are references to the pages of the joint appendix filed with the United States Court of Appeals for the Sixth Circuit in connection with the appeal to that Court. Page references preceded by the letter "R" are references to the original record. Page references preceded by

BLEED THROUGH

the Tennessee State Chancery Court (5A) and removed by the respondents to the Federal District Court at Chattanooga (2A, 24A, A2).

A public bid letting for the project involved had occurred in 1969. After four years of negotiations with the only 1969 bidder, and after repeated downgrading of the contract requirements without resubmission for further public bidding, the original bidder abandoned the project and was dissolved. Without again readvertising the project for open competitive bidding, the local housing authority, over widespread public protest, and demand for such readvertisement, instead in late 1973 issued a deed to a stranger first formed only weeks before, which never had to bid competitively against anyone for the public property. The land was sold at far below its value under the reuse plan, for an unneeded local reuse, far beneath the true potential for the site in question.

No Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(C), was ever prepared, nor were public hearings held on the threshold issue of the necessity of an EIS.

Petitioners asserted mismanagement of public funds and property and the letting of an illegal contract by the public authorities. They also asserted that they had sustained special injury not shared in by the public generally since they had been denied the opportunity to speak as to the proper reuse of Cameron Hill and above all the opportunity to bid in free and open competition for the public land, which they desired to do.

(Footnote Continued)

letter "A" are to the subsequent pages of this petition where the opinions of the lower courts are attached as appendices.

One month after suit was filed, but after removal to the local District Court, petitioners sought to amend to raise the specific question of whether an EIS under NEPA was, in any event, a prerequisite for conveying the public land for the use intended.

Both lower courts found that petitioner lacked standing to bring the initial suit in the Chancery Court of Hamilton County, Tennessee, at Chattanooga, and that accordingly, removal jurisdiction did not exist in the Federal District Court, hence the action was to be dismissed. The District Court held that the requested NEPA issue amendment could not be considered on the standing to sue question, holding that it would be improper to allow the amendment if no standing to sue existed under the complaint when the cause was removed (A12).

The questions thereby presented are the following:

1. Did petitioners have standing to sue?

   A. Were the controlling Tennessee decisions erroneously applied by the lower Federal Courts?

   B. If not, do the recent decisions of the United States Supreme Court governing the standing of a citizen to sue nonetheless control, where federal rights are asserted in a state court proceeding?

   C. If so, did petitioners show sufficient injury in fact to themselves to meet federal standing to sue requirements?

   D. Should the NEPA issue which petitioners sought to raise by a timely amendment have been considered a part of their original complaint when evaluating their standing to sue?

BLEED THROUGH

2. Was the deed to Cameron Hill from the Chattanooga Housing Authority to Cameron-Oxford Associates void by reason of the failure of the Chattanooga Housing Authority to resubmit the project for public bidding, where both the Federal Housing Act, and the Tennessee Housing Authority Act, adopted pursuant to the Federal Act, required the Chattanooga Housing Authority to give "maximum opportunity, consistent with the sound needs of the locality as a whole, for the redevelopment of the urban renewal area by private enterprise"?

STATUTES INVOLVED

The Federal Housing Act provides in part as follows (42 U.S.C. § 1455):

§ 1455. Requirements for loan- or capital-grant contracts

Approval of urban renewal plan

Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that—

(a) The urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that (i) the financial aid to be provided in the contract is necessary to enable the project to be undertaken in accordance with the urban renewal plan; (ii) *the urban renewal plan will afford maximum opportunity, consistent with the sound needs of the locality as a whole for the rehabilitation or redevelopment of the urban renewal area by private enterprise;* (iii) the urban

renewal plan conforms to a general plan for the development of the locality as a whole; and (iv) the urban renewal plan gives due consideration to the provision of adequate park and recreational areas and facilities, as may be desirable for neighborhood improvement, with special consideration for the health, safety, and welfare of children residing in the general vicinity of the site covered by the plan. (Emphasis supplied).

The Tennessee Housing Authority law provides in part as follows (T.C.A. § 13-821):

13-821. Conservation and rehabilitation by private enterprise—Findings.—It is hereby found and declared that (a) there exist in municipalities of the state slum, blighted, and deteriorated areas which constitute a serious and growing menace, injurious to the public health, safety, morals and welfare of the residents of the state, and the findings and declarations made in § 13-813 with respect to slum and blighted areas are hereby affirmed and restated, (b) certain slum, blighted, or deteriorated areas, or portions thereof, may require acquisitions and clearance, as provided in §§ 13-813—13-827, since the prevailing condition of decay may make impracticable the reclamation of the area by conservation or rehabilitation, but other areas or portions thereof may, through the means provided in §§ 13-813—13-827, be susceptible of conservation or rehabilitation in such a manner that the conditions and evils hereinbefore enumerated may be eliminated, remedied or prevented, and to the extent feasible, salvable slum and blighted areas should be conserved and rehabilitated through voluntary action and the regulatory process, and (c) all powers conferred

BLEED THROUGH

by §§ 13-813—13-827, are for public uses and purposes for which public money may be expended and such other powers exercised, and the necessity in the public interest for the provisions of §§ 13-813—13-827, is hereby declared as a matter of legislative determination. *A municipality, to the greatest extent it determines to be feasible in carrying out the provisions of §§ 13-813—13-827, shall afford maximum opportunity, consistent with the sound needs of the municipality as a whole, to the rehabilitation or redevelopment of areas by private enterprise.* (Emphasis supplied) [Acts 1955, ch. 181, § 1.]

STATEMENT OF FACTS

In 1957 an urban renewal program was adopted in Chattanooga involving several hundred acres of land immediately west of downtown Chattanooga, said project being known as the "Golden Gateway Urban Renewal Program" (R 3-5, 447). Included within the project was Cameron Hill, a 55 acre tract lying immediately west of downtown Chattanooga (R 5, 448). It represented the largest undeveloped tract of land in the immediate downtown vicinity and its total area is to be contrasted with the approximately 70 acres in Chattanooga's central business district (Exhibits 10, 10A, 18 and 22).

Cameron Hill was a major historic landmark in the Civil War history of the area (R 123, 316, 374, Ex. 31, 396-397, 402, 405-406) and Boynton Park on its top commemorated this history, all as shown by various monuments and historical markers on the hill (R 123, Ex. 19). The City of Chattanooga held title to Boynton Park (R 10, 15).

As part of said renewal plan, Cameron Hill was lowered some 125 feet, thereby providing a major source of fill dirt for other public needs and creating approximately 22 acres of flat usable land on the lowered top of the hill (R 78, 55; 79A). In the process, Boynton Park was destroyed.

Both the original applicable reuse plan in 1958 (R 88, Ex. 34) as well as an amendment to same in 1968 (R 82, 88, 449-451, Ex. 36, Ex. 6) contemplated that Cameron Hill, after lowering, would be used in part for residential purposes, with up to seven acres of the useable 22 acres available for commercial development (R 20-21, 23-26).

In 1969 the respondent Chattanooga Housing Authority ("CHA") advertised for proposals for the development of the entire Cameron Hill tract, consistent with the reuse plan (Ex. 37). This was the largest and most complex project in the urban renewal area (R 50). At that time Cameron Hill was within the Chattanooga Fire Zone, requiring substantially more expensive fireproof construction than outside the zone (R 281-283, 464-466). The invitation to bid required the developer to include the dedication of a public park in his proposal, but left the size and location of the park to the developer (R 11-12, Ex. 37). The invitation to bid made no mention that proposals would be acceptable conditioned upon the developer being able thereafter to obtain financing for the proposed project.

The only bid submitted was that of Future Chattanooga Development Corporation ("Future") (R 36, 454), which proposed to build a 600-unit apartment complex estimated to cost $12,000,000.00 to $15,000,000.00 (R 36-39), with an offer of $345,000.00 for the public land (See CHA minutes for October 16, 1969, Exhibit 11). Future's proposal, however, was actually non-

BLEED THROUGH

responsive to CHA's advertised request for bids, since it was expressly conditioned upon Future being able to obtain the necessary financing for the proposed project, which it had yet to achieve (R 42-43). This had not been the practice on other bid lettings (R 290).

In 1970 Cameron Hill was excluded from the fire zone by Chattanooga City Ordinance 17-51, thus permitting substantially cheaper construction (about 20%) than was permitted at the time of the 1969 bidding (R 282-283, 464-466).

Future was never able to obtain the financing for its ambitious project. CHA, however, did not resubmit the Cameron Hill site for further bidding but instead permitted Future to repeatedly downgrade its original proposal, always subject to the obtaining of financing. Finally, Future proposed to CHA at its meeting of May 12, 1972 (Exhibit 11) that Broadmoor Shopping Centers, Inc. ("Broadmoor") be allowed to join Future in the Cameron Hill Project, with same thereafter to be a joint venture between these two corporations (R 457). CHA did not object and again made no effort to resubmit the matter for public bidding. The joint venture submitted a revised proposal to CHA at said meeting which eliminated from the proposal the purchase and development of "that part of the original complex fronting on Ninth Street with a value of $120,000.00." On June 9, 1972, a contract was entered into between CHA on the one hand and Future and Broadmoor on the other (as approved at said meeting of May 12, 1972), providing for the purchase of the remaining bulk of the Cameron Hill realty by the venture for $220,000.00 and the development in phases of a residential housing complex on said realty (Ex. 9). This development had been announced at said meeting of May 12, 1972, as a $5.5 million com-

plex with 396 apartment units (Exs. 11 and 39). Said contract expressly provided, however, that the obligations of Future and Broadmoor were subject to their being able to obtain the necessary financing (R 43-44).

This is the only contract that ever resulted from the bid letting in the fall of 1969 (R 39-40, 45, 103). It is to be noted that the construction proposed under said contract was to be at a cost of approximately one-third of that publicly announced by Future shortly after it made its original proposal (Exs. 7 and 11). Further, without resubmitting the project for further competitive bidding due to the changed conditions, CHA allowed the joint venturers to avoid purchasing and developing over one-third of the tract in terms of value (Ninth Street frontage) and also to take advantage of the removal of the site from the Chattanooga Fire Zone (R 284). As a result, wood frame construction for low rise units was now proposed under said contract instead of the original fireproof high rise units. Said wood frame construction was in compliance, however, with minimum FHA standards (R 435-437).

Thereafter, further modification in design and quality occurred, and the passing months again turned into further years while the joint adventurers sought to design a feasible project of their liking which they would be able to finance, with repeated extensions of time to act being given them by CHA (R 46-48, 482).

At the meeting of CHA of November 21, 1973 (Ex. 11), it was announced that Future was being dissolved, and was withdrawing from the project (R 65, 460-461), and that a limited partnership was being organized which would carry on with the Cameron Hill project, with Oxford Development Corporation ("Ox-

BLEED THROUGH

ford") as its sole general partner. The consent of CHA was given at said meeting to this new arrangement and to the conveyance of Cameron Hill to the proposed limited partnership.

On November 29, 1973, an Indiana limited partnership was formed, known as Cameron-Oxford Associates ("Cameron"), whose certificate was recorded in Hamilton County, Tennessee, on December 12, 1973 (Ex. 47). Said certificate described the Cameron Hill realty as its place of business and showed that the general partner was Oxford, with a five percent interest, with Lyle A. Rosenzweig, Trustee, of Indianapolis, Indiana, being the limited partner, with a ninety-five percent interest, in exchange for $100.00 contributed to the partnership.

Cameron was never in a contractual relationship with CHA relative to the development of Cameron Hill prior to December 19, 1973. On that date, however, CHA nonetheless executed a special warranty deed to Cameron, conveying a portion of the Cameron Hill realty, including approximately 16 acres of the flat 22 acres on top, for the sum of $157,500.00 (Ex. 45; R 102, 489). CHA did this pursuant to its June 9, 1972 contract with Future and Broadmoor to which Cameron was not a party (R 103). The deed required construction by the Grantee of the apartment project as ultimately proposed by Future and Broadmoor to CHA.

It is the intention of CHA and Cameron that the remainder of Cameron Hill be later conveyed to Cameron for similar housing development at a similar per acre price as otherwise called for by said contract of June 9, 1972, to which Cameron was not a party (Ex. 9). Public disclosure of the principal members and investors in Cameron as required by law was never made (76A-77A; R 63, 64-67, 68).

Thus, more than four years elapsed from the opening of the original conditional bid for the development of Cameron Hill until a deed to a portion of same occurred with a required reuse calling for the construction of 380 low rise wood frame dwelling units, instead of the 600 fireproof high rise units originally proposed by Future (Exs. 7 and 23). No further invitation for public bidding occurred after the original bid opening in 1969 (R 49).

Under the procedures adopted by CHA and HUD, these organizations are essentially passive and merely receive reuse proposals instead of affirmatively initiating same (R 213-214). No redevelopment or reuse proposal can be accepted until both entities have approved same, however (R 427), and these entities on occasion require proposal modification before such approval will be granted, as in the present case (R 213-214).

Cameron proposed as the public park to be dedicated as part of the project a six acre tract located where the public road enters the hilltop. Only approximately one and one-half acres of this six acres is on the flat surface on top of the hill with the remainder being on the steep hillsides (R 16, 18). The public road bisects this smaller usable area into two small tracts each less than an acre in size (Ex. 4).

This park bears no resemblance in utility, purpose, or usable size to the original Boynton Park and was obviously intended by Cameron to serve as a tastefully landscaped gateway, built and maintained at public expense, to Cameron's housing project (R 119, 138-139).

The project is being financed by a $4,210,600.00 construction loan from respondent Advance Mortgage Corporation, a Delaware corporation ("Advance") secured by a deed of trust (Exhibit 46) to the realty

BLEED THROUGH

from Cameron to respondent Milligan-Reynolds Guaranty Title Agency, Inc., Trustee ("Milligan-Reynolds"). Advance, in turn, has obtained FHA mortgage insurance (R 159-161, 164, 235, 425) under Title 220 of the Federal Housing Act (R 42, 47), which is concerned with providing replacement housing in Urban Renewal areas (R 30). The FHA commitment for Cameron was made in December, 1973 (R 103, 471-473).

At the time the subject suit was filed on February 13, 1974, no construction had started on Cameron Hill (R 103), despite a provision in said deed of December 19, 1973 (Ex. 45) requiring that same start within 30 days of the date of the deed. Construction thereafter began. Cameron has elected to proceed despite the institution of the present action before construction started, and its full awareness of the contentions of the Petitioners.

The price which CHA permitted Cameron to pay in 1973 for the realty in question was based on 1969 appraisals (R 187; Exs. 15 and 16) which did not seek to appraise the fair market value of the property as such, but instead sought to determine the price which the developer should pay for the land, as determined by the economics of the proposed reuse of the land by the developer (R 82-87). Thus, once project construction costs and the approved rental rates were known, after due allowance for a profit for the developer, original land cost was a variable which was adjusted downward to make the developer's proposal economically feasible, regardless of the actual value of the land. No appraisal of land value based upon *all* the available uses for the property under the 1968 reuse plan was ever obtained (R 85-87). Land values have increased substantially in the Chattanooga area since 1969 and particularly land of the type available on

Cameron Hill. On any reasonable basis the land was worth far in excess of the sale price (R 121-123, 309-313, 360-361). HUD agreed that private developers were typically paying $1,000 per unit for non-public raw land (R 185) whereas Cameron was paying about $600, or $10,000 per usable acre (R 183-184); that development costs were the same in either case (R 186); and that no subsidy was supposed to be involved (R 187).

The market for the type housing units involved at the rentals proposed has been fully met in the past by private developers in the Chattanooga area on land other than public land (R 48-49). There has been a proliferation of this type of housing in the Chattanooga area since 1969 (R 163). There is no shortage of this housing at the present time in the Chattanooga area at these rentals and none projected (R 319-320). HUD agreed that private developers have met Chattanooga's need for this type housing (R 424-425).

Other than the public advertisement in 1969 seeking proposals for the development of Cameron Hill, however, no other public notice of meetings dealing with Cameron Hill and its developers was given in advance of such meetings by CHA and/or the City (R 61-62). The Chattanooga Chapter of the American Institute of Architects became aware in November of 1973 that Future was withdrawing from the project and that CHA proposed to go ahead with the project by dealing with Cameron. At this point a committee of three local architects, including petitioner Wamp, was appointed by said Chattanooga Chapter of the AIA to investigate what was happening.

On December 7, 1973, said Chattanooga Chapter of the AIA officially protested by letter to CHA "the

BLEED THROUGH

proposed medium density ordinary FHA housing development plan for Cameron Hill" (Ex. 23, R 297-298). This letter with the reasons for the protest is set out in full in the complaint (15A-16A) and was Exhibit 23 at the trial. As shown by said exhibit, it was felt "the present proposal degrades this magnificent site and . . . will prohibit proper future use". CHA was asked "to stop this present proposed development." It pointed out that the original proposed developers had withdrawn, and that the project approved by CHA and awarded to Cameron was done "with no competition or public notice". It pointed out the changes in Chattanooga since the last reuse study, and stated "we are confident the site can now be utilized for a much higher finer function if the business and design community is given an opportunity to compete on the basis of changed criteria." The letter concluded by pledging the full resources of the Chattanooga Chapter of the AIA to create a fitting development for Cameron Hill.

HUD was also aware of the stand of the local architects (R 345) which the record indicates was a unanimous opinion (R 297, 307, 326), before the deed to Cameron.

NEPA (42 U.S.C. § 4321 et seq.) became effective January 1, 1970. As set forth above, at that time, there was no contract whatsoever between CHA and Future, or any other developer with respect to Cameron Hill. There was no approval of any proposal by CHA or HUD and no FHA mortgage loan insurance commitment of any sort. A HUD capital grant of $9,105,755.00 to CHA constituted the principal funds used to finance the Renewal Project, although $3,472,234.00 in city funds were also used (Ex. 13). Approximately $1,250,000 of public funds was spent readying Cameron Hill for reuse proposals (R 77-78). HUD's approval of the de-

tails of the transaction between CHA and Cameron was not finally obtained until immediately before deed delivery on December 19, 1973 (R 477-478; Ex. 44; Ex. 11).

Before HUD gave its approval to the proposed housing development a "Special Environmental Clearance Form" (HUD form ECO-4) was prepared and filed by HUD on May 25, 1973, as to the subject project and "cleared" on July 2, 1973 (R 152-154; 249; Ex. 21). CHA did not participate in its preparation (R 73). This form specifically found that an EIS was not required for the proposed Cameron Hill project (R 155). Accordingly, HUD has found that "major federal action significantly affecting the quality of the human environment" under NEPA (42 U.S.C. § 4332(2)(C)) was not involved in the Cameron Hill project.

Review of said form ECO-4 shows on its face that many of the inquiries made by the form were ignored; that only the briefest and most cursory answers were given in most instances; and that repeatedly mere conclusions without explanations or supporting facts which could be reviewed are given.

Original suit was filed February 13, 1974 (24A), before ground was broken for the project (13A, R 103). On March 13, 1974, after removal to the Federal Court, Petitioners sought to amend to allege violations of the National Environmental Policy Act ("NEPA") (39A-42A).

On April 11, 1974, without acting upon said motion to amend, the District Judge set a special hearing to begin April 29, 1974, to hear evidence and argument on whether Defendants were required to file an Environmental Impact Statement ("EIS") under NEPA (43A). Three days of hearings were held (A2). Hav-

BLEED THROUGH

ing concluded that initial removal jurisdiction did not exist because of the finding of lack of standing to sue in the State Court (A8, A12), the District Judge held that attempted amendments to the pleadings, subsequent to removal, to raise the NEPA issues, cannot serve to confer Federal Court jurisdiction if none in fact existed as of the time of removal (A3). Thus the Court deemed it "unnecessary and inappropriate" to act upon said motion to amend (A12), and did not do so, nor did it consider the NEPA issues raised by said proposed amendments though fully tried at said specially set hearing.

The U. S. Court of Appeals for the Sixth Circuit did not pass on this action by the trial judge though raised in the appeal.

At the District Court NEPA issue hearings, petitioners presented substantial proof that an EIS was a prerequisite under NEPA before a valid deed could be delivered and the proposed project approved. Should resolution of this issue become material the cause should be remanded to the Federal District Judge for appropriate decision.

Plaintiff, Moccasin Bend Association, is a Tennessee nonprofit corporation chartered in 1958 (Ex. 20, R 145), whose members have been active for years in seeking to properly preserve the Moccasin Bend area across the Tennessee River from Cameron Hill (R 141, Ex. 32). This Plaintiff through its members years ago actively resisted the lowering of Cameron Hill and the destruction of Boynton Park, including a lawsuit which in 1962 went to the Tennessee Supreme Court. That Court held they had no standing to sue as to that issue (R 127, 381-382, 79A).

Thereafter, they spent funds (R 124) and worked constantly towards the reestablishment of a suitable

park on Cameron Hill to replace Boynton Park, in keeping with the historical significance of the site (R 104-105, 114-115, 117, 119, 121-122, 124, 376-378, 459).

Members of the Association have vigorously protested the proposed park at CHA meetings and also protested the lack of any opportunity on the part of those interested to "participate in the planning for the area to be set aside for park purposes until, in effect, the plans for the project were an accomplished fact" (CHA's minutes of January 12, 1973, Exhibit 11).

Petitioner Wamp was a past president of the Chattanooga Chapter of the American Institute of Architects with very substantial experience in planning and developing apartment projects. He had been the most active local architect in the overall Golden Gateway Urban Renewal Project of which Cameron Hill was a part. He had been active through the local Chapter of the AIA in studying the plans for Cameron Hill from a professional and civic viewpoint and meeting with the CHA as to problems noted since 1969 (R 291-301). He desired to bid for the property and to develop same in accordance with the reuse plan personally, under open competitive conditions (R 289-290).

Various of the Plaintiffs and members of the Association made repeated prior use of Cameron Hill and particularly Boynton Park on its summit in past years (R 120, 138, 142, 145, 382, 405). They desire to use the park if again properly reestablished (R 128) and some possibly even to move to Cameron Hill (R 142-143). The original complaint charged:

> "26. Plaintiffs are specially injured in that they have been effectively denied a public hearing

BLEED THROUGH

on the issue of the proper use to which Cameron Hill should be put, and/or opportunity to offer proposals for the development of Cameron Hill in free and open competition with any other interested parties, an opportunity they earnestly seek, not only as a matter of right, but also for the betterment of Chattanooga.

"27. As taxpayers, Plaintiffs will also be irreparably injured through the low return of taxes to the community from the presently planned housing project as compared to the much higher tax yield the property should and would generate if properly utilized."

Cameron Hill is a leading site for the future logical expansion of downtown Chattanooga. It is an appropriate site for civic type buildings; park purposes; appropriate commercial buildings; as well as various types of housing, and particularly high rise housing. The present development is probably the least impressive of any that could be undertaken and remain within the scope of the 1968 reuse plan. Cameron Hill has tremendous potential for the Chattanooga downtown area and, therefore, the entire community, if properly and realistically developed with appropriate imagination (R 306, Ex. 23).

REASONS FOR GRANTING THE WRIT

I

Petitioners Did Have the Necessary Standing to Sue

A. The Controlling Tennessee Decisions Were Erroneously Applied by the Lower Federal Courts.

Two Tennessee cases will fully illustrate to the Court the basic Tennessee state law on the standing to

sue issue. They are *Burns* v. *City of Nashville*, 142 Tenn. 541, 221 S.W. 828 (1919); and *Badgett* v. *Rogers*, 222 Tenn. 374, 436 S.W. 2d 292 (1969).

Badgett cites *Burns* and exhaustively reviews the prior cases and sets forth the general rule in Tennessee as follows (page 294):

> "As a general rule of long standing in Tennessee, individual citizens and taxpayers may not interfere with, restrain or direct official acts, when such citizens fail to allege and prove damages or injuries to themselves different in character or kind from those sustained by the public at large."

On the same page it also stated the following:

> "However, the courts have recognized an exception to the general rule where it is asserted that the assessment or levy of a tax is illegal or that public funds are misused or unlawfully diverted from stated purposes."

In *Burns* it was recognized that individual citizen-taxpayers can bring suit against public officials for mismanagement and the letting of illegal contracts.

In view of the allegations and proof of misuse of public property, illegality of the contract and deed in question, and mismanagement, petitioners are well within the exception to the Tennessee general rule, even without alleging special injury to themselves.

The distinction made by the District Judge between the misuse or unlawful diversion of public *funds* recognized to be within the exception in *Badgett*, and the misuse of public *property* here involved (A8-A9), is a distinction without a difference. Merely because no Tennessee case involving property as compared to funds could be found (A8-A9), does not mean that there

BLEED THROUGH

is any distinction to be made between the *type* public asset misused or unlawfully diverted, for the loss to the public is equally great in either case.

Under the applicable statutes, regulations and resolutions hereinafter discussed, it was entirely illegal to dispose of Cameron Hill without free and open competitive bidding.

While adhering to the foregoing authorities, the Tennessee Supreme Court in a 1975 decision, *Bennett* v. *Stutts*, 521 S.W. 2d 575 at page 577, recognized the practicalities of persuading public officials, such as the District Attorney General, to act to redress public wrongs such as those alleged in the present case. It stated

> "Public spirited citizens should not be stifled or stopped in their search for solution to public wrongs and official misconduct such as are involved in this case.
>
> * * *
>
> (3) When citizens sue to rectify a public wrong, under these circumstances, a copy of the complaint shall be served upon the District Attorney General. It shall be the duty of the trial court forthwith to conduct an in limine hearing designed to determine whether to permit plaintiffs to proceed. If it be determined that the District Attorney General's refusal to bring the action, or to authorize the use of his name in its institution, was improper or unjustified, or that plaintiff's case is prima facie meritorious, the trial court shall permit the action to proceed."

In the subject case paragraph 3 of the prayers for relief in the original complaint prayed that the Attorney General of Hamilton County, Tennessee "be

notified of the filing of this complaint so that he may intervene to enforce the rights of the general public under these circumstances, should he determine to do so." (23A). The record will reflect that no such intervention occurred and that the trial court failed to hear and consider whether the failure of the Attorney General to act in and of itself gave petitioners standing under Tennessee law as summarized in the *Bennett* decision.

The prior unreported 1962 decision of the Tennessee Supreme Court holding that the Moccasin Bend Association had no standing to resist the lowering of Cameron Hill, and the destruction of Boynton Park on its surface, was referred to by both the District Judge (page A12) and the U.S. Court of Appeals for the Sixth Circuit (page A16) in support of their ruling. As shown by the quote from that decision by the U.S. Court of Appeals for the Sixth Circuit in its opinion (page A17), standing to sue was denied in that case because the injury was general and not special to the then plaintiffs. That is not the present case.

Those of the petitioners who wished to bid and/or be heard (21A) had no greater right to do so than any other member of the public generally. They, however, unlike the vast majority of the public, which had no such direct interest in bidding, and/or being heard in the decision making process, were specially injured when denied the opportunity to bid under the altered conditions and/or to otherwise be heard.

Petitioners accordingly respectfully contend that the lower Federal Courts have failed to correctly apply the controlling Tennessee decisions to this case and have accordingly erroneously decided that petitioners had no standing to sue.

BLEED THROUGH

B. Where Federal Rights Are Asserted in a State Court Proceeding, Federal Decisions Control Standing to Sue.

So far as Petitioners have been able to determine, this issue has not previously been passed upon this court, or any other lower federal court.

Even if standing to sue did not exist under Tennessee state law the recent decisions of this court have revamped and broadened the law as to the standing of a citizen to sue. The narrow general Tennessee rule was formerly Federal law also. While there are earlier and later cases, Petitioners believe the key decision here to be *U. S.* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), (1973) 412 U.S. 669, 37 L. Ed. 2d 254, 93 S. Ct. 2405, which amplified and clarified *Sierra Club* v. *Morton*, (1972) 405 U.S. 727, 31 L. Ed. 2d 636, 92 S. Ct. 1361.

In *SCRAP* this court stated (412 U.S. 686-688):

> "Relying upon our prior decisions in Data Processing Service v Camp, 397 US 150, 25 L Ed 2d 184, 90 S Ct 827, and Barlow v Collins, 397 US 159, 25 L Ed 2d 192, 90 S Ct 832, we held that § 702 of the APA conferred standing to obtain judicial review of agency action only upon those who could show 'that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated.' 405 US, at 733, 31 L Ed 2d 636."
>
> "In interpreting 'injury in fact' we made it clear that standing was not confined to those who could show 'economic harm,' although both Data

Processing and Barlow had involved that kind of injury. Nor, we said, could the fact that many persons shared the same injury be insufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury. Rather, we explained: 'Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' Id., at 734, 31 L Ed 2d 636. Consequently, neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those [412 US 687] resources suffered the same harm, deprives them of standing.

In Sierra Club, though, we went on to stress the importance of demonstrating that the party seeking review be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders. No such specific injury was alleged in Sierra Club."

* * *

"Unlike the specific and geographically limited federal action of which the petitioner complained in Sierra Club, the challenged agency action in this case is applicable to substantially all of the Nation's railroads, and thus allegedly has an adverse environmental impact on all the natural re-

BLEED THROUGH

> sources of the country. Rather than a limited group of persons who used a picturesque valley in California, all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury."
>
> * * *
>
> "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion."

When federal questions arise in causes pending in the state courts, the latter are competent to decide them. *Missouri Pac. R. Co.* v. *Fitzgerald,* (Neb. 1896) 16 S. Ct. 389, 160 U.S. 556, 40 L. Ed. 536. The state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts. *Grubb* v. *Public Utilities Commission of Ohio,* (Ohio 1930) 50 S. Ct. 374, 281 U.S. 470, 74 L. Ed. 972. See also *Missouri* v. *Taylor,* (Mo. 1924) 45 S. Ct. 47, 226 U.S. 200, 69 L. Ed. 247.

Apart from the requested amendment charging NEPA violation (39A), the original complaint charged violations of provisions of the Federal Housing Act and also of HUD guidelines which gave rights to Petitioners and which Petitioners were entitled to enforce (18A, 19A, 21A). All state laws and Chattanooga Housing Authority resolutions involved in this case are permeated

with the overriding federal enabling legislation and have a quasi federal tinge. Federal funds which filtered to the local level are also heavily involved.

It is clear that the plaintiffs could bring an action against HUD and the other defendants in State Court pursuant to the Federal Housing Act, 42 U.S.C.A. §§ 1441, et seq., because Congress has not expressly limited jurisdiction under this act to federal courts and therefore concurrent jurisdiction exists. *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C.A. Okl. 1942); *Holiday Magic, Inc.* v. *Warren*, 357 F. Supp. 20 (D.C. Wis. 1973).

For examples of cases where citizens' rights under the Federal Housing Act have been dealt with in the state courts see also, *Alaska State Housing Authority* v. *Contento*, (Alaska Sup. Ct. 1967) 432 P. 2d 117; *Town of Brookline* v. *Brookline Development Authority*, (Mass. Sup. Jud. Ct., 1962) 183 N.E. 2d 484; *City of Buffalo* v. *Mollenberg-Betz Machine Co.*, 279 N.Y.S. 2d 842. See also *Green Street Association* v. *Daley*, (C.A. 7, 1967) 373 F. 2d 1.

Just as there is no restriction in the Federal Housing Act preventing a citizen from enforcing his federal rights thereunder in a state court, similarly there is no such restriction in NEPA (42 U.S.C. § 4321, et seq.).

When a state court determines federal questions, its decisions on federal law must conform to the decisions of the United States Supreme Court. *Chesapeake & O. R. Co.* v. *Martin*, 283 U.S. 209; 20 Am. Jur. 2d, *Courts*, § 226 and cases therein cited. Any other rule would be an intolerable interference with the federal right.

BLEED THROUGH

It is accordingly respectfully submitted that the "injury in fact" concepts set forth in *Sierra Club* and *SCRAP* control standing to sue to assert federal rights even if these rights were asserted in a state court proceeding.

C. Petitioners Sustained Sufficient "Injury in Fact" to Meet Federal Standing to Sue Requirements.

Those of petitioners who desired to bid in 1973 suffered "economic harm" when denied that opportunity to make a profit. The statutes directing that "maximum opportunity" be given for development by private enterprise, as well as the law of public contracts generally, were violated when no competitive bidding occurred, resulting in injury to an interest of petitioners "arguably within the zone of interest to be protected or regulated by the statutes that the agencies were claimed to have violated." The additional taxes the individual petitioners will have to pay will also result in economic injury.

Further, petitioners have shown harm to their use and enjoyment of the natural resources of the Chattanooga area by the gross mishandling of the Cameron Hill tract, and particularly the reestablishment of the public park thereon. They have shown a much greater degree of injury, in fact, than the students in *SCRAP* who were found to have standing to sue.

In a footnote the U.S. Court of Appeals for the Sixth Circuit in its opinion stated (page A17):

> "Even if federal standing decisions were applicable, appellants would be met by the decisions of this court in *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (6th Cir. 1973), *cert. denied*, 414 U.S. 1068 (1973); and *South Hill Neighborhood*

Association v. *Romney*, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970)."

The foregoing decisions cannot stand in the face of *Sierra Club* and *SCRAP*, if the foregoing decisions are otherwise deemed to be proper authority denying petitioners the necessary standing to sue under the facts in this case.

D. The NEPA Issue Which Petitioners Sought to Raise by Timely Amendment After Removal of the Cause to the Federal District Court Should Have Been Considered a Part of Their Complaint When Determining Their Standing to Sue.

The U. S. Court of Appeals for the 6th Circuit held that if the state court lacks jurisdiction of the subject matter or of the parties, the Federal Court acquires none when the cause is removed to that court (page A17). The District Judge further held that an attempted amendment to the pleadings subsequent to removal cannot serve to confer Federal Court jurisdiction if none, in fact, existed as of the time of removal (A3).

Assuming that the allegations of the original complaint in the state Chancery Court were insufficient to give petitioners standing to sue, which they dispute, it is clear that the amendment which they sought approximately a month after suit was filed, raising the question of whether NEPA required an EIS before the project could be approved, and a valid deed granted, would unquestionably have been an issue petitioners had standing to raise under the *Sierra Club* and *SCRAP* decisions.

The state court had jurisdiction of this issue. Actually, the complaint as filed was broad enough to raise this issue since denial of the right to participate

BLEED THROUGH

in the decision-making process was specifically alleged, although no reference to NEPA per se was originally made.

Under these circumstances, where the actions of the respondents in removing the cause prevented petitioners from seeking a timely amendment in the state court proceedings, is it proper for the District Judge to dismiss the cause or at the least should he have remanded the cause to the state court, which had the power to allow the amendment, even if the District Judge felt that he did not because of the technicalities of removal jurisdiction? Petitioners respectfully submit that as a matter of proper procedure, under the peculiar circumstances of this case, they should not have been required to refile their law suit, with the NEPA issue included in the new complaint, but instead at the least were entitled to a remand to the state court for allowance of the amendment.

By considering only the status of the pleadings as of the time of removal without reference to the pleadings as they would have been after timely amendment, and deciding the standing to sue issue on the more narrow, rather than the broader viewpoint, petitioners were denied, through no fault of their own, a proper view of their overall position when their standing to sue was being evaluated.

This was particularly ironic since the NEPA issue was fully tried before the District Judge by all parties, even though the amendment had not been allowed.

There was a clear requirement that an EIS under NEPA be prepared for the project in question prior to its authorization but none whatsoever was prepared nor has it been prepared to date. With the acreage, location and the dollar amount of the FHA loan com-

mitment here involved, existing cases quickly demonstrate that an EIS under NEPA was a prerequisite.

Silva v. *Romney* (*Lynn*), 342 F. Supp. 783 (D.C. Mass., April 13, 1972); 473 F. 2d 287 (C.A. 1, Feb. 2, 1973); and 482 F. 2d 1282 (C.A. 1, July 5, 1973) establishes as a matter of law that an EIS under NEPA is a prerequisite to valid HUD action approving a sale to a private developer of land for construction of more than 100 housing units, where a $4,000,000.00 HUD mortgage guarantee was involved—almost exactly the present case. *Silva* also held that the private contractor was in a "federal partnership" with HUD, and that both were properly subject to a preliminary injunction by the District Court pending proper compliance with NEPA.

See also *Goose Hollow Foothills League* v. *Romney*, 334 F. Supp. 877 (1971) and 58 *Iowa Law Review*, 805-890 where as extensive article appears entitled "HUD And The Human Environment; A Preliminary Analysis Of The Impact Of The National Environmental Policy Act of 1969 Upon The Department of Housing And Urban Development," and particularly pages 845 ff.

The major federal action in question involved here occurred after NEPA became effective, hence NEPA had to be complied with. *Environmental Defense Fund* v. *Tennessee Valley Auth.*, 468 F. 2d 1164 (C.A. 6, 1972); *Calvert Cliffs' Coordinating Comm.* v. *Atomic Energy Commission*, 449 F. 2d 1109 (D.C. Cir. 1971); see also § 11 of the 1971 CEQ Guideline (17 ALR Fed. 33 at 49-50).

As the lead federal agency, HUD was responsible for complying with NEPA. Prior to making its threshold determination of significance under NEPA, HUD

BLEED THROUGH

must give notice to the public of the proposed major federal action involved and an opportunity to submit relevant facts which might bear upon the agency's threshold determination. *Hanly* v. *Kleindienst,* 471 F. 2d 823 (2d Cir. 1972); *Hanly* v. *Mitchell,* 460 F. 2d 640 (2d Cir. 1972). This obviously was never done in the subject case in violation of plaintiffs' rights (R 226).

HUD acknowledged that major federal action was involved in the present case but felt that there was no significant environmental impact (R 258-259). It acknowledged that an EIS would have been required when Cameron Hill was lowered if NEPA had then been in existence (R 252). It also acknowledged that the HUD office handling the project had prepared only one EIS under NEPA, and this involved a renewal housing project at Greenville, Tennessee almost identical in dollars and acreage with the subject project (R 267-268).

It accordingly appears that there was substantial merit to the NEPA issue which petitioners sought to raise and which they had standing to raise under *Sierra Club* and *SCRAP.* The matter should have been handled procedurally so that the amendment could have been allowed before the standing to sue issue was determined.

II

The Failure to Resubmit the Cameron Hill Project for Public Bidding in 1973 Violated the Federal Housing Act and the Tennessee Housing Authority Act As Well As the General Law on Public Contracts With the Result That the Deed of Cameron Hill to Cameron-Oxford Associates Was Void

Although the District Judge found that Petitioners had no standing to sue, hence he had no jurisdiction,

he nonetheless went into the merits of petitioners' contentions as to illegal acts on the part of the respondents. While finding conduct that was "most inappropriate" (A11); "unusual, if not questionable" (A9), and an illegal failure to make public disclosure of the identity of the principal members of the developer (A10), which latter illegality the District Judge found Plaintiffs had no standing to litigate (A10), the District Judge otherwise held that he "is unable to find any specific instance of illegal conduct on the part of the Chattanooga Housing Authority or any other defendant with regard to" the disposition of Cameron Hill (A9).

The U. S. Court of Appeals for the Sixth Circuit did not deal with the merits of these findings though raised in petitioners' appeal to that Court.

When Congress and the Tennessee Legislature each adopted statutory provisions requiring those responsible for the redevelopment of public land in urban renewal areas "to afford maximum opportunity . . . to the rehabilitation or redevelopment . . . by private enterprise" it must be presumed that the well established general law in the field of public contracts was the standard by which the true meaning of those words was to be established. The following excerpts from the article on "Public Works and Contracts" at 64 Am. Jur. 2d is highly material on the applicable general law.

From Section 58

> "Indeed, it is the duty of the public authorities to reject all bids which do not comply substantially with the terms of the proposal, for any other rule would destroy free competition. A contract entered into on terms more favorable to the contractor than indicated by the advertised plans or

BLEED THROUGH

specifications, or incorporating material changes in and additions to those plans and specifications, is void."

From Section 66

"After bids have been made upon the basis of plans and specifications prepared by public authorities and given out to all interested bidders, no material or substantial change in any of the terms of such plans and specifications will be allowed without a new advertisement giving all bidders opportunity to bid under the new plans and specifications.

Thus, public authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited; the contract which they execute must be the contract offered to the lowest responsible bidder by advertisement, and any contract entered into containing substantial provisions beneficial to the bidder which were not included in the specifications is void. Any other course would prevent real competition, lead to favoritism and fraud, and defeat the purpose of the law in requiring contracts to be let upon bids made upon advertised specifications. A contract let upon the basis of anything else but the advertised plans and specifications would be one let without the competitive bidding which is necessary to give it validity."

From Section 80

"The law does not permit private negotiations with an individual bidder, nor any change of plans and specifications submitted for the competition,

nor variances for the purpose of obtaining a change in the bid of one or more bidders. The whole matter is to be conducted with as much fairness, certainty, publicity, and absolute impartiality as any proceeding requiring the exercise of quasi-judicial authority. Thus, if after advertising for and receiving sealed proposals for the doing of public work for a municipality, none of the bids is found satisfactory, the public body has no authority to favor one of the bidders by negotiations with him privately, changing the scope of the work to be done or the terms of payment therefor in consideration of the reduction of his offer. All persons desiring to bid upon the work and willing to comply with the terms prescribed must have equal opportunities to do so; and if the work is not awarded upon the first competition for any legitimate reason, it must be submitted to a second, with full opportunity as before for all persons desiring to participate to do so."

The resolution of CHA adopted May 12, 1967, required the disposition of all Renewal Project property "under open competitive conditions." At the Board meeting of CHA held July 11, 1969 (Ex. 11) the resolution authorizing the public offering of Cameron Hill specifically provided for "sale under open competitive conditions as set out in the public notice. . ." HUD's own guidelines by which CHA was bound required disposal of project land "in a fair and equitable manner" with procedures designed to assure "that they are open, in one way or another to public scrutiny." See HUD's Urban Renewal Handbook, Chapter 1, Section 1 (*RHM 7214.1*, set forth in paragraph 24I of the Complaint, 19A-20A). Said HUD guidelines further require (as there shown) that "each disposal of land . . . shall be at a price that is not less than the fair value of the

BLEED THROUGH

land *for uses* in accordance with the Urban Renewal Plan."

The foregoing CHA resolutions and HUD guidelines complied with the statutory requirements. They were never cancelled or withdrawn. They were ignored when CHA conveyed to Cameron without prior public bidding in late 1973.

It was an abuse of discretion and arbitrary and capricious for CHA and HUD to allow the substantial changes in bid conditions to occur as here, without again submitting the matter for further public competition. As trustees for the public of this valuable land they abused fundamental trust law principles prohibiting favoritism and requiring reasonable effort to obtain the best price and best proposal. Any citizen such as petitioners who desired an *equal* opportunity to compete for the purchase and development of Cameron Hill has been effectively denied such opportunity under the circumstances of this case. Maximum opportunity to compete has not been given, as required by both state and federal law. Any such citizen has been specially injured in that he has been denied a fundamental right granted by Tennessee and federal law.

It was the obligation of Cameron to ascertain at its peril that CHA was acting within its authority when Cameron accepted the deed to Cameron Hill from CHA. 56 Am. Jur. 2d, "*Municipal Corporations*", §§ 504 and 554. When dealing with the public housing authority "plaintiffs were bound to know the limitation of its power." *Brown* v. *Mt. Vernon Housing Auth.*, (1952) 279 App. Div. 795, 109 N.Y.S. 2d 392. See also *Pittman Const. Co.* v. *Housing Authority of Opelousas*, (W.D. La. 1958) 167 F. Supp. 517.

Petitioners respectfully insist that the foregoing statutes, regulation, and resolution requiring that maximum opportunity be given to compete must be read in the light of the foregoing general law. It would be ridiculous to assume that Congress had any lesser standard in mind when it insisted on maximum opportunity as the overriding standard. It certainly did not revoke the general long-standing salutary rules governing bidding on public contracts, requiring equality of opportunity to all and preference to none. None of the defendants can point to any authority relieving HUD and CHA from complying with these basic bidding principles essential to the public welfare. Thus the District Judge was in error when he described the procedure followed merely as "most inappropriate" but legal (A11), instead of holding the award of the project and the deed to be illegal and void.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a Writ of Certiorari should accordingly issue to review the action of the U. S. Court of Appeals for the 6th Circuit approving the decision of the U. S. District Court for the Eastern District of Tennessee, Southern Division.

Respectfully submitted,

RICHARD P. JAHN
TANNER & JAHN
1223 Volunteer Building
Chattanooga, Tennessee 37402
Attorneys for Petitioners

March 3, 1976

BLEED THROUGH

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

CIV-1-74-41

DONALD L. WAMP; MARK K. WILSON, JR.; CARL L. GIBSON; SHERMAN L. PAUL; and MOCCASIN BEND ASSOCIATION, a Tennessee non-profit corporation,

Plaintiffs

-vs.-

CHATTANOOGA HOUSING AUTHORITY, a Tennessee corporation; CITY OF CHATTANOOGA, TENNESSEE, a municipal corporation; CAMERON-OXFORD ASSOCIATES, an Indiana limited partnership; ADVANCE MORTGAGE CORPORATION, a Delaware corporation; MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., a Tennessee corporation; THE UNITED STATES OF AMERICA, ex rel the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also ex rel the FEDERAL HOUSING ADMINISTRATION,

Defendants

OPINION

(Filed September 19, 1974)

This is an action in which the plaintiffs seek to enjoin the construction of an apartment complex upon Cameron Hill, a local landmark within an urban re-

newal project in Chattanooga, Tennessee. The plaintiffs seek further to obtain a cancellation of the deeds and contracts between the developer and the government agencies in interest and to compel a re-evaluation, re-solicitation, and redisposition of the Cameron Hill tract. The lawsuit was filed in the state court and removed to this court. It is presently before this Court upon the following motions: (1) motions on behalf of the defendants, Chattanooga Housing Authority and the City of Chattanooga, to dismiss the complaint for lack of standing on the part of the plaintiffs to maintain the lawsuit (Court File #8 and #11); (2) motion on behalf of the plaintiffs for a preliminary injunction (Court File #17); (3) motion on behalf of the plaintiffs to amend their complaint so as to allege a cause of action for violation of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c) (Court File #18); and (4) motion on behalf of the defendant, Chattanooga Housing Authority, for summary judgment (Court File #29). An evidentiary hearing extending over portions of three days was held on the plaintiffs' motion for a temporary injunction and the case is now before the Court upon the record thus established.

A threshold question in this lawsuit is with reference to the removal jurisdiction of this Court, for, as noted, this lawsuit was filed in the state court and removed to this court. The defendants, the United States Department of Housing and Urban Development (HUD) and the Federal Housing Authority (FHA), petitioned for removal, averring federal agency removal jurisdiction under 28 U.S.C. § 1346(a)(2) and § 1441(a). The other defendants petitioned for removal averring federal question removal jurisdiction under 28 U.S.C. § 1331 and § 1441. The parties have raised no issue regarding removal jurisdiction but the defendants have

BLEED THROUGH

each asserted a lack of standing upon the part of the plaintiffs to maintain the lawsuit. That assertion of necessity raises the issue of removal jurisdiction, for a finding of a lack of standing would prevent the existence of a "case or controversy," a prerequisite to federal court jurisdiction under Article III of the Federal Constitution. (*Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970); *Sierra Club* v. *Morton*, 405 U.S. 727, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972). In the absence of jurisdiction, no right of removal could exist.

In considering the issue of standing, further principles of removal law must be borne in mind. The first such principle is that the right of removal must have existed as of the time removal was attempted and the pleadings must be viewed accordingly. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 95 L. Ed. 702, 71 S. Ct. 534 (1951); *McLeod* v. *Cities Service Gas Co.*, 233 F. 2d 242 (10th Cir., 1956). Developments in the lawsuit or attempted amendments to the pleadings subsequent to removal cannot serve to confer federal court jurisdiction if none in fact existed as of the time of removal. Accordingly, the jurisdictional issue must be resolved before the Court can consider the plaintiffs' post-removal motion to amend their complaint or the plaintiffs' motion for a temporary injunction.

A second principle of removal law that must be borne in mind is that jurisdiction in the state court is also a prerequisite to removal of a lawsuit to the federal court, as federal court removal jurisdiction is to this extent derivative. In the absence of state court jurisdiction, a dismissal rather than a remand of the lawsuit is required. *Lambert Run Coal Co.* v. *Balti-*

more & O. R. Co., 258 U.S. 377, 66 L. Ed. 671, 42 S. Ct. 349 (1922); *Venner* v. *Michigan Central R. Co.*, 271 U.S. 127, 70 L. Ed. 868, 46 S. Ct. 444 (1926); *Freeman* v. *Bee Machine Co.*, 319 U.S. 448, 87 L. Ed. 1509, ... S. Ct. .... (1943). *See also* Moore's FEDERAL PRACTICE, Vol. 1A, § 0.164[2] note 41 and § 0.157[3].

It is appropriate, therefore, to look initially to the issue of jurisdiction in the state court prior to removal. It is also appropriate to note that the lack of standing of a party to maintain a lawsuit has been held to be jurisdictional in the Chancery Courts of Tennessee. In *Patton* v. *Chattanooga*, 108 Tenn. 197, wherein the issue was with regard to the standing of a taxpayer to maintain an action in chancery court against a municipality, the rule was stated thusly at page 227:

> "Thus examined, the Tennessee cases show that the court had *jurisdiction* to pass on questions, admittedly of a judicial nature, only when such *jurisdiction* is invoked 'by those having a special or peculiar interest in the question and there are none to the contrary'." (Emphasis supplied)

With regard to the interest of the plaintiffs in this lawsuit, the original complaint avers that each of the four individual plaintiffs "is a taxpayer to the City of Chattanooga, Tennessee and/or Hamilton County, Tennessee". The plaintiff, Moccasin Bend Association, is averred to be a non-profit corporation having as one of its primary concerns "the proper development of Cameron Hill and Moccasin Bend, prominent local historical landmarks". The complaint then proceeds to aver that some 15 years ago the Chattanooga Housing Authority acquired certain property in or adjacent to the downtown commercial area of Chatta-

BLEED THROUGH

nooga in the course of an urban renewal project known as the "Golden Gateway Urban Renewal Project". Included within the property acquired was Cameron Hill, which in turn included a previously existing municipal park known as "Boynton Park". It is further averred that in December of 1973 the defendant, Chattanooga Housing Authority, effected a sale of the Cameron Hill tract to the defendant, Cameron-Oxford Associates, a limited partnership, upon the commitment of the latter to erect an apartment complex on the tract. Various irregularities are alleged on the part of the Chattanooga Housing Authority in planning for the use of the Cameron Hill tract and in effecting a sale of that tract, including (a) failure to permit adequate public participation in planning for the use of the tract, (b) failure to achieve the most beneficial use of the tract, (c) failure to re-establish an adequate replacement for Boynton Park, (d) failure to follow open competitive bidding in effecting a sale of the tract, (e) failure to obtain an adequate price for the tract, (f) failure to require disclosure of the true identity of the purchaser-developer, (g) improperly permitting delays on the part of the purchaser-developer in submitting a firm proposal and in initiating improvements, and (h) failure to give adequate public notice of the various activities hereinabove referred to. The co-defendants are alleged to have participated in one manner or another in the foregoing improper activities of the Chattanooga Housing Authority.

The defendants, both by motion and in their answers, deny standing upon the part of the plaintiffs to maintain this lawsuit.

In connection with the evidentiary hearing upon the plaintiffs' motion for a temporary injunction, the fol-

lowing facts having reference to the issue of standing were made to appear. The plaintiff, Donald Wamp, owns property within Chattanooga and is accordingly a taxpayer of that city. He is an architect by profession. His only interest in the subject matter of the lawsuit is derived from his status as a municipal taxpayer and a resident architect. The plaintiffs, Mark K. Wilson, Jr. and Carl Gibson, were not identified in the evidentiary hearing, their interest in the lawsuit having been described in the complaint as taxpayers of "Chattanooga and/or Hamilton County, Tennessee". The plaintiff, Sherman L. Paul, is a non-resident of Chattanooga, but is a resident of Hamilton County, residing on Signal Mountain, Tennessee. He is a former county tax assessor and is President of the Moccasin Bend Association. His interest in the lawsuit is derived from his status as a taxpayer of Hamilton County and his position as President of the Moccasin Bend Association. The plaintiff, the Moccasin Bend Association, is a non-profit corporation having as one of its purposes the preservation and enhancement of historic and scenic landmarks in the Chattanooga Area, including Cameron Hill. The re-establishment of Boynton Park on Cameron Hill in a manner deemed adequate is an area of particular interest to the association and its members.

Suffice it to say in summary, the interest of each individual plaintiff is that of a civic minded taxpayer of the city or county wherein Cameron Hill is located. The interest of the corporate plaintiff is that of an association concerned with the preservation of local scenic and historic landmarks. Neither plaintiff asserts any ownership in Cameron Hill or any economic or financial interest in its disposition other than as taxpayers or, in the case of Moccasin Bend Association,

BLEED THROUGH

as a civic improvement organization. Nor do they claim any special injury to themselves, different from that which might be asserted by any civic minded taxpayer or by any association concerned with the preservation and enhancement of local areas having scenic and historic attributes.

The rule in Tennessee is well established that citizens and taxpayers are without standing to maintain a lawsuit to restrain or direct governmental action unless they first allege and establish that they will suffer some special injury not common to citizens and taxpayers generally. *Patton* v. *City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901). The reasons for the rule, as given in the *Patton* case, were variously stated to be that "Courts do not sit to declare abstract propositions of law" and that, "in matters common to all citizens, the law confers upon the duly elected representatives of the people the sole right to appeal to the courts for redress" and that "if the cities could not exercise public powers, even erroneously or unwisely, when lawfully done by their constituted legislative authority, without the concurrence of every citizen or taxpayer, it would be impossible to have municipal governments. . ." In the rather recent case of *Badgett* v. *Rogers*, 222 Tenn. 374, 436 S.W.2d 292 (1968), the Tennessee Supreme Court stated the rule to be as follows:

> "As a general rule of long standing in Tennessee, individual citizens and taxpayers may not interfere with, restrain or direct official acts, when such citizens fail to allege and prove damages or injuries to themselves different in character or kind from those sustained by the public at large."

The plaintiffs contend, however, that the allegations and facts in the present case bring them within an exception to the general rule, that exception being that a taxpayer may sue without averring or establishing any special injury where an illegal use of public funds is involved. The exception relied upon by the plaintiffs is stated as follows in *Badgett* v. *Rogers*, *supra*, 456 S.W.2d 292 at 294:

> "However the courts have recognized an exception to the general rule where it is asserted that the assessment or levy of a tax is illegal or that public funds are misused or unlawfully diverted from stated purposes."

Having thus stated the exception, it should be noted that the Court in the *Badgett* case nevertheless disallowed an action wherein a taxpayer sought to attack the legality of an expense allotment to a mayor, the expense allotment being in addition to his salary. The disallowance was predicated upon the conclusion that the taxpayer had made insufficient allegations of fact regarding the illegality of the expense allotment.

Under the allegations of the complaint, as well as under the facts as hereinabove found by the Court, it would appear that the plaintiffs were without standing to maintain this lawsuit in the Chancery Court of the State of Tennessee wherein it was originally filed. There is no contention made or evidence submitted that the plaintiffs, by reason of the matters complained of, have sustained any special injury or any injury other than that common to all civic minded taxpayers. In fact, the plaintiff, Moccasin Bend Association, does not even assert the status of a taxpayer. With regard to the contention of the individual plaintiff-taxpayers that they come within the exception announced in

BLEED THROUGH

Badgett v. *Rogers, supra,* affording standing to a taxpayer to litigate an alleged misuse of public funds, there are two difficulties. The first is that the exception stated in the *Badgett* case refers only to the misuse of public funds, not to the misuse of public property. The present case involves the alleged mismanagement of property in an urban renewal project. Each case cited in the *Badgett* case in support of the exception therein stated pertains to the levying of an unlawful tax or the unlawful expenditure of public funds. The plaintiffs have cited no Tennessee case and the Court has been unable to find one wherein the courts of Tennessee have allowed a taxpayer claiming no special injury to maintain a suit for mismanagement of public property.

In the second place, while the complaint avers many irregularities upon the part of the Chattanooga Housing Authority in the disposition of the Cameron Hill tract and the evidence reflects that a number of unusual, if not questionable, practices were followed by that agency in the negotiation and awarding of a contract disposing of the Cameron Hill tract, the Court, with but one possible exception, is unable to find any specific instance of illegal conduct on the part of the Chattanooga Housing Authority or any other defendant with regard to that disposition. Rather, each action appears to have been within the legislative or administrative authority or discretion of the various agencies and defendants involved.

The only statutory provisions cited to the Court and contended to have been violated under the allegations of the complaint as filed in the state court were the provisions of section 1455(a)(ii) of Title 42 U.S.C. and T.C.A. § 13-821, wherein the agencies responsible

for urban renewal projects were required to "afford maximum opportunity" to private enterprise to effect redevelopment, and the provisions of section 1455(e)(1) of Title 42 U.S.C. wherein the local agency in charge of an urban renewal project is required, as a condition precedent to the awarding of a contract, to make public disclosure of "the name of the redeveloper . . . its officers and principal members, shareholders and investors, and other interested parties". There is no evidence of a violation of section 1455(a)(ii) or T.C.A. § 13-821. The Chattanooga Housing Authority does appear to have entered into a contract with a developer, Cameron-Oxford Associates, a limited partnership listing a trustee as the limited partner having a 95% partnership interest, but without making or requiring any public disclosure of equitable owners or beneficiaries of the trust. Whether this omission would constitute a sufficiently substantial failure on the part of the Chattanooga Housing Authority to constitute a statutory violation or whether such a violation would render any contract thereafter entered into void or voidable at the instance of the Chattanooga Housing Authority, the H.U.D., the F.H.A., or the United States attorney acting under his general authority, the Court does not here decide. Suffice it to say that such illegality, if in fact it be an illegality, affords no standing under Tennessee law to a taxpayer suffering no special injury therefrom to litigate the issue.

With regard to agency guidelines, a Chattanooga Housing Authority guideline alleged to have been violated was one providing that urban renewal tracts should be disposed of "under open competitive conditions". The evidence is undisputed that Chattanooga Housing Authority did solicit bids under "open competitive conditions", but, receiving only one bid, there-

BLEED THROUGH

upon proceeded to engage in extensive, prolonged and private negotiations with the bidder, its successors and assigns, for the disposition of the Cameron Hill tract. Such action on the part of a public agency dealing with public property was, in the Court's opinion, most inappropriate. It does not appear to have been in violation of any law.

Another agency guideline alleged to have been violated was the requirement that urban renewal tracts be disposed of for "fair value" and "in a fair and equitable manner". H.U.D. having approved the sale here under attack, both the generality of the guidelines and the nature of the evidence provide no basis for the substitution of judicial discretion in lieu of agency discretion as to whether the disposition was effected in a "fair and equitable manner" or as to what may have been a "fair value" for the property under the limitations and conditions of the sale.

It is the further insistence of the plaintiffs that the defendants, and in particular the Chattanooga Housing Authority, acted illegally in failing to re-establish a park of adequate size and appropriate location on Cameron Hill to replace the former Boynton Park. The plaintiffs' contention in this regard appears to be that the title of Chattanooga Housing Authority to the Cameron Hill tract was impressed with a trust to this effect. The evidence fails to reflect, however, that the Chattanooga Housing Authority held title to the Cameron Hill tract subject to any such equitable encumbrance or duty. Rather, it appears that the Chattanooga Housing Authority acquired clear title to the entire Cameron Hill tract some 15 years ago, including the former municipal park located thereon. Cameron Hill has remained undeveloped and unused since its acquisition by the Chattanooga Housing Authority. In fact, some 10

or 12 years ago the entire top portion of the hill was removed to acquire fill material for a highway project. At that time litigation was initiated by citizens and taxpayers against the Chattanooga Housing Authority in an effort to prevent the dispoilation of the hill and to preserve the Boynton Park area. The litigation resulted in an adjudication by the Tennessee Supreme Court that "the bill fails to show any proposed illegal action of the Housing Authority" and "these complainants are entitled to no rights in Boynton Park other than those common to all citizens of Chattanooga". *See Mrs. Sim Perry Long, et al.* v. *Chattanooga Housing Authority, et al.* (unpublished opinion entered November 9, 1962).

The Court is of the opinion that no genuine issue of fact exists but that the plaintiffs were without standing to maintain this lawsuit in the Chancery Court of Hamilton County, Tennessee, wherein it was originally filed and wherein it was pending at the time of removal to this court. The plaintiffs being without standing to maintain the lawsuit, the Tennessee Chancery Court was without jurisdiction to entertain the lawsuit. The state court being without jurisdiction, this Court is, by derivation, likewise without jurisdiction. The lawsuit must accordingly be dismissed.

In view of the conclusion herein reached, it becomes unnecessary and inappropriate to consider the further contentions and motions in the case, including the contentions of the parties with regard to the plaintiffs' standing or lack of standing under the federal law, and including the plaintiffs' motions to amend their complaint and for a temporary injunction.

An order will enter dismissing this lawsuit for lack of jurisdiction.

/s/ Frank W. Wilson
United States District Judge

BLEED THROUGH

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

CIV-1-74-41

DONALD L. WAMP; MARK K. WILSON, JR.; CARL L. GIBSON; SHERMAN L. PAUL; and MOCCASIN BEND ASSOCIATION, a Tennessee non-profit corporation,

Plaintiffs

-vs.-

CHATTANOOGA HOUSING AUTHORITY, a Tennessee corporation; CITY OF CHATTANOOGA, TENNESSEE, a municipal corporation; CAMERON-OXFORD ASSOCIATES, an Indiana limited partnership; ADVANCE MORTGAGE CORPORATION, a Delaware corporation; MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., a Tennessee corporation; THE UNITED STATES OF AMERICA, ex rel the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also ex rel the FEDERAL HOUSING ADMINISTRATION,

Defendants

JUDGMENT OF DISMISSAL

(Filed September 19, 1974)

This is an action in which the plaintiffs seek injunctive relief with reference to a tract of land within an urban renewal project. The case is presently before the Court upon various motions, including motions by

the defendants for summary judgment. For the reasons set forth in an opinion filed herein, it is the judgment of the Court that the case should be dismissed for lack of jurisdiction.

It is accordingly ORDERED that the defendants' motion for summary judgment be sustained and that the lawsuit be and the same is hereby dismissed for lack of jurisdiction.

APPROVED FOR ENTRY.

/s/ Frank W. Wilson
United States District Judge

BLEED THROUGH

No. 75-1192

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD L. WAMP, ET AL.,
Plaintiffs-Appellants,

v.

CHATTANOOGA HOUSING AUTHORITY, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed December 5, 1975.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PER CURIAM. This action was filed to enjoin the construction of an apartment complex on Cameron Hill, a local landmark in Chattanooga, Tennessee, where municipally owned Boynton Park formerly was located. The suit was initiated in the State Chancery Court and was removed by the defendant to the United States District Court.

In an opinion published at 384 F.Supp. 251 (E.D. Tenn. 1974), Chief District Judge Frank W. Wilson held that the plaintiffs did not have standing under Tennessee law to maintain the suit in Tennessee Chan-

cery Court and that the District Court therefore had no removal jurisdiction. Accordingly, the action was dismissed. Plaintiffs appeal. Reference is made to the reported decision of the District Court for a recitation of the pertinent facts.

Appellants contend that the District Court incorrectly construed the relevant Tennessee decisions and, therefore, they have standing to sue under Tennessee state law. We hold that the District Court correctly construed and applied the controlling decisions of the Supreme Court of Tennessee. *Sachs* v. *County Election Commission*, 525 S.W.2d 672, 673 (Tenn. 1975); *Bennett* v. *Stutts*, 521 S.W.2d 575, 576 (Tenn. 1975); *Badgett* v. *Rogers*, 436 S.W.2d 292, 294 (Tenn. 1968); *Patton* v. *City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901).

The Supreme Court of Tennessee ruled to the same effect in its decision in another case involving the Cameron Hill area in Chattanooga. In an action filed in Chancery Court, a group of interested citizens and taxpayers sought to enjoin the Chattanooga Housing Authority and the City of Chattanooga from altering or changing the natural contours or topography of Boynton Park and abolishing it as a public park. In an unpublished decision announced November 9, 1962, the Supreme Court of Tennessee said:

> Second, these complainants are entitled to no rights in Boynton Park other than those common to all citizens of Chattanooga.
>
> Tennessee decisions holding as above stated are legion. It is said that the leading case is Patton v. Chattanooga, 108 Tenn. 197.

It is further asserted by appellants that, even if the District Court was correct in its interpretation of

BLEED THROUGH

Tennessee law, they have standing as a matter of federal law. We agree with the District Court that if appellants had no standing to maintain the action in the State court, the District Court had no removal jurisdiction.[1]

In *Lambert Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382 (1922), the Supreme Court, speaking through Mr. Justice Brandeis, said:

> The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction.

Lambert was followed and applied in this court in *Bancohio* v. *Fox*, 516 F.2d 29 (6th Cir. 1975), in which numerous other decisions are cited to the same effect. *See also Friedr. Zoellner Corp.* v. *Tex. Metals Co.*, 396 F.2d 300, 301 (2d Cir. 1968).

The decision of the District Court is affirmed. Costs on this appeal are taxed against appellants.

---

1. Even if federal standing decisions were applicable, appellants would be met by the decisions of this court in *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (6th Cir. 1973), cert. denied, 414 U.S. 1068 (1973); and *South Hill Neighborhood Association* v. *Romney*, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1192

DONALD L. WAMP, ET AL.,
Plaintiffs-Appellants,

v.

CHATTANOOGA HOUSING AUTHORITY, ET AL.,
Defendants-Appellees.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

JUDGMENT

(Filed December 5, 1975)

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal,

BLEED THROUGH

as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.

/s/ John P. Hehman
Clerk

Supreme Court, U. S.
FILED
MAY 5 1976
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1252

DONALD L. WAMP, et al,
Petitioners,

vs.

CHATTANOOGA HOUSING AUTHORITY, et al,
Respondents.

JOINT BRIEF OF THE RESPONDENTS, CHATTANOOGA HOUSING AUTHORITY AND CITY OF CHATTANOOGA, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RANDALL L. NELSON
Counsel for Respondent,
Chattanooga Housing Authority
400 Pioneer Bank Building
Chattanooga, Tennessee 37402
(615) 265-2291

GARY D. LANDER and
EUGENE N. COLLINS
Counsel for Respondent,
City of Chattanooga
400 Pioneer Bank Building
Chattanooga, Tennessee 37402
(615) 265-2291

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

BLEED THROUGH

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of Facts	3
Reasons For Not Granting The Writ	6
A. The Holding	6
B. The District Court Correctly Decided Its Own Removal Jurisdiction	6
C. The District Court Was Not Required To Apply Federal Standing Principles	12
D. Petitioners Had No Standing Under Federal Law	13
E. Conclusion	16

TABLE OF AUTHORITIES

Cases:	Page
Alaska State Housing Authority v. *Contento*, 432 P.2d 117 (1967)	9
Badgett v. *Rogers*, 222 Tenn. 374, 436 S.W.2d 292 (1968)	7, 9
Bennett v. *Stutts*, 521 S.W.2d 575 (Tenn. 1975)	7, 8
City of Buffalo v. *Mollenberg-Betz Machine Co.*, 279 N.Y.S.2d 842 (S.Ct. 1966)	9
Curtis Publishing Co. v. *Cassell*, 302 F.2d 132 (10th Cir. 1962)	7
Dine v. *Edwards*, 158 F.2d 17 (7th Cir. 1947)	12
Freeman v. *Bee Machine Co.*, 319 U.S. 448 (1943)	6
Gibson & Perin Co. v. *City of Cincinnati*, 480 F.2d 936 (6th Cir. 1973), *cert. denied* 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973)	14
Gleason v. *United States*, 458 F.2d 171 (3rd Cir. 1972)	7
Griffin v. *McCoach*, 313 U.S. 498 (1941)	12
Herb v. *Pitcairn*, 324 U.S. 117 (1945)	11, 12
Hunter v. *New York*, 121 N.Y.S.2d 841	10

BLEED THROUGH

Cases:	Page
Johnson v. *Redevelopment Agency*, 317 F.2d 872 (9th Cir. 1963), *cert. denied* 375 U.S. 915	10
Lambert Run Coal Co. v. *Baltimore & Ohio R. Co.*, 258 U.S. 377 (1922)	6, 7
Mid-Continent Pipe Line Co. v. *Hargrave*, 129 F.2d 655 (10th Cir. 1942)	10
Patton v. *City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901)	7, 9
Pope v. *Dykes*, 116 Tenn. 230 (1930)	8
Rogers v. *Calumet National Bank*, 358 U.S. 331 (1959)	9
Sachs v. *County Election Comm'n*, 525 S.W.2d 672 (Tenn. 1975)	7
Scates v. *Board of Commissioners of Union City*, 196 Tenn. 274, 265 S.W.2d 536 (1954)	12
South Hill Neighborhood Association v. *Romney*, 421 F.2d 454 (6th Cir. 1969), *cert. denied* 397 U.S. 1025, 90 S.Ct. 1261, 25 L.Ed.2d 534 (1970)	14
Steele v. *G. D. Searle & Co.*, 483 F.2d 339 (5th Cir. 1973)	7
Town of Brookline v. *Brookline Development Authority*, 183 N.E.2d 484 (1962)	9
United States v. *SCRAP*, 412 U.S. 669 (1973)	14

Cases:	Page
Venner v. *Michigan Central R. Co.*, 271 U.S. 127 (1926)	6
Wamp v. *Chattanooga Housing Authority*, 384 F.Supp. 251 (E.D.Tenn. 1974)	8
Warth v. *Seldin*, — U.S. —, 45 L.Ed.2d 343 (1975)	14, 15

STATUTES

42 U.S.C. § 1405	9
42 U.S.C. § 1454 (a)	12
42 U.S.C. § 1455 (a)	12
42 U.S.C. § 1455 (a) (ii)	13
42 U.S.C. § 1455 (b) and (c)	8,10, 12, 13

BLEED THROUGH

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1252

DONALD L. WAMP, et al,
Petitioners,

vs.

CHATTANOOGA HOUSING AUTHORITY, et al,
Respondents.

JOINT BRIEF OF THE RESPONDENTS, CHATTANOOGA HOUSING AUTHORITY AND CITY OF CHATTANOOGA, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents, the Chattanooga Housing Authority (CHA) and City of Chattanooga, Tennessee (City), respectfully submit that no Writ of Certiorari should issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, which Court affirmed the judgment and opinion of the United States District Court for the Eastern District of Tennessee, Southern Division.

OPINIONS BELOW

The opinion of the Court of Appeals, filed December 5, 1975, is reported at 427 F.2d 595 and is also appended to the Petition for Writ of Certiorari at page A15. The opin-

ion of the District Court is reported at 384 F.Supp. 251 and is appended to the Petition for Writ of Certiorari at page A1. This Brief will follow the reference to appendices used by petitioners; see Petition, page 2 n. 1.

JURISDICTION

These respondents do not question the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In addition to the facts set out in the Petition, pages 2-5, it should be noted that the petitioners had a full evidentiary hearing in the district court on a motion for preliminary injunction, *Wamp* v. *Chattanooga Housing Authority*, 384 F.Supp. 251, 253 (E.D. Tenn. 1974). On the issue of standing, the trial judge made specific findings of fact, 284 F.Supp. at 254-55, which petitioners have never shown or even argued to be clearly erroneous. The district court applied the Tennessee law of standing in reviewing the original complaint since its jurisdiction was derivative from that of the state court where the case was filed prior to removal by the federal defendants. Respondents, Chattanooga Housing Authority (CHA) and City of Chattanooga (City) therefore submit that the only issue presented is:

> Whether the district court and court of appeals were correct in holding that the district court had no jurisdiction of this action upon removal from state court because the state court had no jurisdiction under Tennessee rules of standing to challenge administrative acts of public instrumentalities.

BLEED THROUGH

STATUTES INVOLVED

Petitioner herein relied on two federal statutes, 42 U.S.C. 1455 (a) (ii) and 42 U.S.C. 1455 (e).

42 U.S.C. 1455 (a), set out on pages 6-7 of the Petition and relied on by petitioners, was repealed by Act August 22, 1974, P.L. 93-383, Title II, § 204, 88 Stat. 668.

42 U.S.C. 1455 (e):

> "(e) *Public disclosure by redevelopers.* No understanding with respect to, or contract for, the disposition of land within an urban renewal area shall be entered into by a local public agency unless the local public agency shall have first made public, in such form and manner as may be prescribed by the Secretary, (1) the name of the redeveloper, together with the names of its officers and principal members, shareholders and investors, and other interested parties, (2) the redeveloper's estimate of the cost of any residential redevelopment and rehabilitation, and (3) the redeveloper's estimate of rentals and sales prices of any proposed housing involved in such redevelopment and rehabilitation: *Provided, That nothing in this subsection shall constitute a basis for contesting the conveyance of, or title to, such land.*" (Emphasis supplied.)

STATEMENT OF FACTS

CHA and City submit the following additions or changes to the petitioners' *Statement of Facts,* Petition, pages 7-19.

As discussed more fully below, a full evidentiary hearing was held by the district court, which made findings of fact on the question of standing, the principle issue on appeal and here. Petitioners have never challenged these findings as clearly erroneous.

Implementation of the "Golden Gateway Urban Renew-

al Program" was commenced in July, 1958, under the name "Westside Urban Renewal Project." Mr. Billy Cooper, a witness subpoenaed by plaintiffs, has been Exeeeutive Director of CHA since before the commencement of the program. In connection with the lowering of Cameron Hill in the early stages of the program, petitioner Moccasin Bend Association had sued to enjoin this action and the consequent destruction of Boynton Park. This litigation, as the district court found, resulted in an adjudication by the Supreme Court of Tennessee that " 'the bill fails to show any proposed illegal action of the Housing Authority' and 'these complainants are entitled to no rights in the Boynton Park other than those common to all citizens of Chattanooga.' *See, Mrs. Sims Perry Long, et al.* v. *Chattanooga Housing Authority, et al.* (unpublished opinion entered November 9, 1962.)" (Opinion, 384 F.Supp. at 252.) The Court of Appeals also cited this case, 427 F.2d at 596.

The amendment of the reuse plan in 1968 as well as the original plan called for residential development on Cameron Hill (R. 88-89).

During all negotiations with Future Chattanooga Development, the only bidder for development in 1969, and Broadmoor Shopping Centers, Inc., its joint venturer added by permission of CHA in May, 1972, it was shown that the principal of Broadmoor was Lyle A. Rosenzweig and that he was trustee for the majority interest in the successor of that joint venture, Cameron-Oxford Associates (R. 63). In fact, petitioners' counsel, in direct examination admitted that the public notice of the involvement of Cameron in November, 1973, disclosed the position of the same Lyle A. Rosenzweig (R. 66). CHA always deemed Cameron as an assignee of its June, 1972, contract with Broadmoor (R. 67-68).

BLEED THROUGH

Petitioners engage in pure speculation at page 11 of their Petition in asserting the future intentions of CHA or other respondents. The inaccuracy of these assertions as to disclosure is discussed, *supra*. In any event, petitioners do not rely here on the statutory requirements of disclosure, 42 U.S.C. § 1455 (e), for the obvious reason, discussed below, that the concluding terms of the statute state that its violation shall not be the basis for any action contesting the conveyance of land.

Petitioners note at page 13 of their Petition that as of February 12, 1974, no construction had commenced but thereafter began. Construction of the project by Cameron and of the park by the City was never enjoined or abated by the Court. CHA and City represent to this Court that construction of both the 254 units and the park as originally challenged is now complete. CHA has made no other commitments with Cameron for additional development on Cameron Hill. The City has not engaged in direct or indirect supervision of the residential development being done by Cameron.

Neither CHA nor City have any statutory duties under the National Environmental Policy Act (NEPA) discussed at length by petitioners, pages 15-16. These respondents will note, however, that petitioners represented to the Court of Appeals that they had tried their case in full before the district court (Appellants' Appellate Brief, page 6), although the district court did not make any findings on the environmental issues, having held that it was without jurisdiction to allow the amendment raising these issues. The United States presented proof on fulfillment of its statutory obligations under NEPA in regard to the Cameron-Oxford development and loan guarantee and will presumably discuss these points in its Brief. CHA and City

in that the case at bar involved an alleged mismanagement of public property, the petitioners have failed anywhere to illustrate from the record that the district court's findings of fact to the contrary were clearly erroneous. There is, therefore, no basis for review of the finding. Moreover, where an improper diversion of public money or property from its proper use is alleged, plaintiffs must show fraud and corruption in order to attain standing in Tennessee courts. *Pope* v. *Dykes,* 116 Tenn. 230 (1930).

Petitioners' reliance on *Bennett* v. *Stutts,* 521 S.W.2d 575 (Tenn. 1975), is misplaced. (Petition, 21-22.) The record will reflect that process was issued and a copy of the original complaint was served on the Attorney General of Hamilton County as prayed. The evidentiary hearing in the district court considered the question of standing and also explored the merits of the case, and the district court found the case wanting in both respects; *see, Wamp* v. *Chattanooga Housing Authority, supra,* 384 F.Supp. at 255-56. (The only possible instance of illegal conduct by CHA noted by the Court, violation of 42 U.S.C. § 1455 (e), is not here relied upon by petitioners, and said statute, by its own terms, precludes the relief sought by petitioners.) Thus, the district court made the two negative findings which, under *Bennett* v. *Stutts, supra,* would excuse the lack of intervention by the state attorney general and warrant dismissal of the suit. Therefore, no reason is presented for issuance of a writ of certiorari in this regard.

It is submitted that both lower courts correctly applied the Tennessee law in finding that petitioners had no standing before the Chancery Court to sue CHA or the City.

Moreover, the Chancery Court had no jurisdiction over the federal defendants. The original complaint alleged at most an improper agency decision by HUD officials in administering the local urban renewal program. State

BLEED THROUGH

courts have no jurisdiction to review such discretionary actions of federal officers taken under federal law. *Rogers* v. *Calumet National Bank,* 358 U.S. 331 (1959).

The non-governmental defendants in the Chancery Court were necessary parties to the complete relief sought; in the absence of jurisdiction over CHA, the City, or HUD, however, the state court had no case before it in which to review actions of these other defendants. Thus, the district court properly held that there was no jurisdiction of the suit as filed.

To avoid the effect of the Tennessee jurisdictional rule in *Patton* v. *City of Chattanooga, supra,* and *Badgett* v. *Rogers, supra,* petitioners maintain here that they could have sued in state court to challenge aspects of federally funded housing or redevelopment plans. The cases they cite are inapposite, however, and do not support this proposition.

City of Buffalo v. *Mollenberg-Betz Machine Co.,* 279 N.Y.S.2d 842 (S.Ct. 1966), was an eminent domain case involving an attempt of a landowner to obtain in state court removal expenses allowable under 42 U.S.C. § 1405 in excess of amounts provided by state law. Plaintiff urged that federal statute and regulations conferred jurisdiction to award the larger sum. The Court disagreed, holding that the federal statute did not so enlarge the jurisdiction of the court beyond the scope allowed by New York law.

Alaska State Housing Authority v. *Contento,* 432 P.2d 117 (1967), was another eminent domain proceeding wherein the state court likewise refused enhanced removal expenses authorized by federal but not state law.

Town of Brookline v. *Brookline Development Authority,* 183 N.E.2d 484 (1962), involved a suit by a town to enjoin the local redevelopment agency from conveying land to a proposed developer without meeting the requirements of

42 U.S.C. § 1455 (e). The United States was not a party, and the question of jurisdiction apparently was not raised, because in midstream the local redevelopment authority agreed with the town that it should not convey and ultimately was adverse on this point to its co-defendant, the developer.

To the contrary, for example, in *Hunter* v. *New York*, 121 N.Y.S.2d 841, the state court held that tenants in a federally supported redevelopment area had no standing to sue in state court to enjoin a project for failure to comply with the requirements of federal law, finding that Congress had not expressly authorized suits to challenge acts, determinations, or the exercise of discretion of the federal administrator of the Federal Housing Act and that, even if plaintiffs had standing, the state courts had no jurisdiction over the acts of federal officials acting as such in the administration of federal laws. Likewise, in *Johnson* v. *Redevelopment Agency*, 317 F.2d 872 (9th Cir. 1963), *cert. denied* 375 U.S. 915, it was held that a loan and capital grant contract between such agencies and the United States is governed by federal law so that persons not parties to such contracts have no standing to enforce conditions imposed therein upon local redevelopment agencies. Certainly, under this case, the petitioners here had no standing to interfere with the decisions of CHA approved by HUD in the Tennessee chancery courts.

Mid-Continent Pipe Line Co. v. *Hargrave*, 129 F.2d 655 (10th Cir. 1942), holds that state and federal courts are vested with concurrent jurisdiction of suits of a civil nature arising under the laws of the United States except where Congress has expressly limited the jurisdiction to federal courts. For the federally grounded action to be brought in a state court, however, the state court must be one of com-

BLEED THROUGH

petent jurisdiction under state law. Congress has no power to confer jurisdiction over a case on a state inferior court which the state, whether legislatively or judicially, has withheld from that court. A provision in an act of Congress giving state courts concurrent jurisdiction with federal courts neither enhances nor restricts the general jurisdiction of the state courts.

In *Herb* v. *Pitcairn,* 324 U.S. 117 (1945), this Court held that certain suits under the Federal Employers' Liability Act could not be maintained in a city court when the relevant state's supreme court had held that no suits could be maintained in the city court for injuries occurring beyond the territorial jurisdiction of the city. Writing for the majority, Mr. Justice Jackson held:

> "Whether any case is pending in the Illinois courts is a question to be determined by Illinois law, as interpreted by the Illinois Supreme Court. For we have said of the Federal Employers' Liability Act, 'we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, *when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws,* to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure,' " citing *Mondon* v. *N.Y., N.H. & H. R. Co.* (Second Employers' Liability Cases), 223 U.S. 1, 56, 57. (Emphasis supplied.) 324 U.S. at 120.

Thus, when the state court has no jurisdiction over local governments by virtue of the lack of standing of the plaintiffs, as in the Tennessee decisions discussed herein, the state court has no jurisdiction to entertain an action

brought by such plaintiffs allegedly arising under federal statute.

C. The District Court Was Not Required To Apply Federal Standing Principles.

Contrary to petitioners' assertions at page 23 of the Petition, the state court would not have been obliged to apply federal standing cases to a suit filed in state court raising federal questions. The logic of *Herb* v. *Pitcairn, supra,* dictates that state courts apply their own jurisdictional rules to cases brought in state courts. State decisional law governs access to state courts against local, private, or non-federal defendants. *Griffin* v. *McCoach,* 313 U.S. 498 (1941). *See, Dine* v. *Edwards,* 158 F.2d 17 (7th Cir. 1947). The Supreme Court of Tennessee has held that standing to sue a municipality and other state instrumentalities such as CHA is a question of substantive law to be decided by reference to the constitution, statutes, and decisions of Tennessee, since the question is one of the public policy of the sovereign, even when federal decisions might produce a contrary result. *Scates* v. *Board of Commissioners of Union City,* 196 Tenn. 274, 265 S.W.2d 536 (1954).

Even if the presence of federal questions might persuade the state court to follow federal standing rules as to the City and CHA, petitioners appear to have abandoned in this Court their original reliance on violation of 42 U.S.C. § 1455 (b) and (e) (Complaint 19A) and 42 U.S.C. § 1454 (a) (18A), and now cite only 42 U.S.C. § 1455 (a), which was repealed by Act August 22, 1974, P.L. 93-383, Title II, § 204, 88 Stat. 668. The earlier reliance on violation of 42 U.S.C. § 1455 (b) and (e) was obviously misplaced as to CHA under the facts of the case. The terms of 42 U.S.C. § 1455 (b) require the local agency to require the delevopers to commence the renewal project within a

BLEED THROUGH

reasonable time. Any alleged failure of CHA in this regard was moot once the construction commenced. The provisions of 42 U.S.C. § 1455 (e) require certain disclosures about the developer to which land is to be sold. The very last provision of this section states, however:

> "Provided, That nothing in this subsection shall constitute a basis for contesting the conveyance of, or title to, such land."

The district court specifically found no violation of 42 U.S.C. § 1455 (a) (ii), 384 F.Supp. at 256, after plenary hearing of the issue. No violation of federal law was alleged as to the City.

Since the petitioners here assert and can assert no federal statutory violations by CHA or the City which would be actionable at present in district court, the question of the proper rules of standing to be applied by the district court in ascertaining the jurisdiction of the chancery court would appear now to be moot.

D. Petitioners Had No Standing Under Federal Law.

Even if the federal district court were required to apply federal standing principles, both the original complaint and the attempted amendment fail to show the requisite standing under the most recent decisions of this Court.

After reviewing the *evidence* on the issue of standing, the district court commented:

> "Suffice it to say in summary, the interest of each individual plaintiff is that of a civic minded taxpayer of the city or county wherein Cameron Hill is located. The interest of the corporate plaintiff is that of an association concerned with the preservation of local scenic and historic landmarks. Neither plaintiff asserts any ownership in Cameron Hill or any economic or

> financial interest in its disposition other than as taxpayers or, in the case of Moccasin Bend Association, as a civic improvement organization. Nor do they claim any special injury to themselves, different from that which might be asserted by any civic minded taxpayer or by any association concerned with the preservation and enhancement of local areas having scenic and historic attributes." 384 F.Supp. 254-55.

Petitioners do not argue that the findings of fact on which these conclusions were based are clearly erroneous. Here, as on appeal, petitioners rely on *United States* v. *SCRAP*, 412 U.S. 669 (1973), as applicable to them, notwithstanding the findings of the trial court. To this reliance in the appeal below the Court of appeals responded:

> "Even if federal standing decisions were applicable, appellants would be met by the decisions of this court in *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (6th Cir. 1973), *cert. denied*, 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973); and *South Hill Neighborhood Association* v. *Romney*, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025, 90 S.Ct. 1261, 25 L.Ed.2d 534 (1970)." 527 F.2d at 597 n. 1.

Gibson & Perin Co. was decided after this Court's decision in *United States* v. *SCRAP*, *supra*, and in both cases cited by the Court of Appeals the plaintiffs had more of a personal stake in the outcome than was illustrated in the evidentiary hearing in the instant case by any of the petitioners. Moreover, it is urged that the holdings in *Gibson & Perin Co.* and *South Hill Neighborhood Association* have been, in effect, affirmed on the issue of standing by *Warth* v. *Seldin*, — U.S. —, 45 L.Ed.2d 343 (1975), decided during the pendency of the instant appeal below. In that case this Court required allegations of particular injuries to individual plaintiffs to challenge local zoning and hous-

BLEED THROUGH

ing policies (not unlike the Tennessee rule); an actual and apparent non-conjectural relation between injuries of plaintiffs suing as taxpayers and the defendants' actions; and palpable economic injury in fact from defendants' actions to individuals, not mere assertion of the putative rights of third parties whom such individuals did not in fact represent. None of these bases for standing appear in this case. Moreover, in the instant case, petitioners had a full evidentiary hearing before the trial court decided that petitioners had no standing, unlike *Warth* v. *Seldin* (see Douglas, J., dissenting). The petitioners obviously had no standing to challenge the City's actions relative to Boynton Park or CHA's approval of the development under the principles enunciated in *Warth* v. *Seldin, supra.* Thus, the Petition states no question for review in regard to standing of the petitioners.

E. Conclusion.

CHA and City submit that the issues presented by petitioners are insubstantial and do not qualify under any of the advisory criteria of section 1. (b) of Rule 19 of the Supreme Court for issuance of a Writ of Certiorari. Therefore, and for the reasons set forth herein, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

RANDALL L. NELSON
Counsel for Respondent,
Chattanooga Housing Authority
400 Pioneer Bank Building
Chattanooga, Tennessee 37402
(615) 265-2291

GARY D. LANDER and
EUGENE N. COLLINS
Counsel for Respondent,
City of Chattanooga
400 Pioneer Bank Building
Chattanooga, Tennessee 37402
(615) 265-2291

In The

Supreme Court of the United States

OCTOBER TERM, 1975

FILED
MAY 6 1976
MICHAEL RODAK, JR., CLERK

No. 75-1252

DONALD L. WAMP, CARL L. GIBSON, SHERMAN L. PAUL and MOCCASIN BEND ASSOCIATION,
Petitioners,

vs.

CHATTANOOGA HOUSING AUTHORITY, CITY OF CHATTANOOGA, TENNESSEE, CAMERON-OXFORD ASSOCIATES, ADVANCE MORTGAGE CORPORATION, MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., THE UNITED STATES OF AMERICA EX REL. THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also EX REL. THE FEDERAL HOUSING ADMINISTRATION,
Respondents.

BRIEF ON THE PART OF RESPONDENTS, CAMERON-OXFORD ASSOCIATES, ADVANCE MORTGAGE CORPORATION, AND MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY THE PETITIONERS

GEORGE L. FOSTER
HALL, HAYNES, LUSK & FOSTER
615 Pioneer Building
Chattanooga, Tennessee 37402
Attorney for the Respondents, Advance Mortgage Corporation and Milligan-Reynolds Guaranty Title Agency, Inc.

JAMES W. GENTRY, JR.
GENTRY & BOEHM
650 Pioneer Building
Chattanooga, Tennessee 37402
Attorney for the Respondent, Cameron-Oxford Associates

E. L. Mendenhall, Inc., 926 Cherry St., Kansas City, Mo. 64106, 816-421-3030

TABLE OF CONTENTS

Prior Opinions and Orders 2

Jurisdiction 3

Questions Presented for Review 3

Statutes Involved 4

Statement of the Case 5

Argument 14

I. The Petitioners Do Not Have Standing to Sue Pursuant to the Law of the State of Tennessee 14

II. There Was No Abuse of Discretion on the Part of the District Judge in Failing to Allow Petitioners' Requested Amendment Based Upon Alleged Violations of NEPA 18

III. The Jurisdiction of a Federal Court Upon Removal Is a Derivative Jurisdiction and If the State Court Lacked Jurisdiction, So Does the Federal Court 19

IV. The Proposed Reestablishment of Boynton Park Confers No Standing Upon Petitioners 20

Conclusion 21

Appendix—

Opinion of the United States District Court for the Eastern District of Tennessee A1

Judgment of Dismissal, United States District Court for the Eastern District of Tennessee A13

Opinion of the United States Court of Appeals for the Sixth Circuit A15

Judgment, United States Court of Appeals for the Sixth Circuit A18

Order on Mandate in the United States District Court for the Eastern District of Tennessee A20

Table of Authorities

Cases

Badgett v. *Rogers*, 222 Tenn. 374, 436 S.W. 2d 292 (1968) 14, 15, 17, 18

Bancohio v. *Fox*, 516 F. 2d 29 (6th Cir. 1975) 20

Buford, et al. v. *State Board of Elections* (1960), 206 Tenn. 480, 334 S.W. 2d 726 16

Comie v. *Buehler Corp.*, 449 F. 2d 644 (CA 9th 1971) 18

City of Buffalo v. *Mollenberg-Betz Machine Co.*, 279 N.Y.S. 2d 842 19

Ford v. *Farmer, et al.* (1848), 28 Tenn. 152 16

Friedr. Zoellner Corp. v. *Tex. Metals Co.*, 396 F. 2d 300 (2d Cir. 1968) 20

Gibson & Perin Co. v. *City of Cincinnati*, 480 F. 2d 936 (6th Cir. 1973), Cert. Denied, 414 U.S. 1068 (1973) 20

Green Street Association v. *Daley* (CA 7 1967), 373 F. 2d 1 19

Hale v. *Ralston Purina Co.*, 432 F. 2d 156 (CA 8th 1970) 18

Kennedy v. *Montgomery County* (1897), 98 Tenn. 165, 38 S.W. 1075 17

Lambert Co. v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377 (1922) 19, 20

Pope, et al. v. *Dykes, et al.* (1905), 116 Tenn. 230, 93 S.W. 85 16

Patton v. *City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901) 14, 16

Reams v. *Board of Mayor and Aldermen of McMinnville* (1927), 155 Tenn. 222, 291 S.W. 1067 16

Southern v. *Beeler, et al.* (1946), 183 Tenn. 272, 195 S.W. 2d 857 16

Southern Railroad Company v. *Hamblen County* (1905), 115 Tenn. 526, 92 S.W. 238 16

Southern Railroad Company v. *Hamblen County, et al.* (1906), 117 Tenn. 327, 97 S.W. 455 16

South Hill Neighborhood Association v. *Romney*, 421 F. 2d 454 (6th Cir. 1969), Cert. Denied, 397 U.S. 1025 (1970) 20

Walldorf, et al. v. *City of Chattanooga, et al.*, (1951), 192 Tenn. 86, 237 S.W. 2d 939 16

Wilkins, et al. v. *Chicago, St. Louis and New Orleans Railroad Co., et al.* (1903), 110 Tenn. 422, 75 S.W. 1026 16

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 18

STATUTES

Federal Housing Act—

42 U.S.C., Sec. 441 4

42 U.S.C., Sec. 1455 ..... 4, 9

42 U.S.C., Sec. 1446 (now Sec. 1434) 4

National Environmental Policy Act, 42 U.S.C., Sec. 4321, et seq. 3, 4

Tennessee Housing Authority Law, T.C.A. 13-801—13-833 4

BLEED THROUGH

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1252

DONALD L. WAMP, CARL L. GIBSON, SHERMAN L. PAUL and MOCCASIN BEND ASSOCIATION,
Petitioners,

vs.

CHATTANOOGA HOUSING AUTHORITY, CITY OF CHATTANOOGA, TENNESSEE, CAMERON-OXFORD ASSOCIATES, ADVANCE MORTGAGE CORPORATION, MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., THE UNITED STATES OF AMERICA EX REL. THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also EX REL. THE FEDERAL HOUSING ADMINISTRATION,
Respondents.

BRIEF ON THE PART OF RESPONDENTS, CAMERON-OXFORD ASSOCIATES, ADVANCE MORTGAGE CORPORATION, AND MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY THE PETITIONERS

The respondents, Cameron-Oxford Associates, Advance Mortgage Corporation, and Milligan-Reynolds Guaranty Title Agency, Inc., respectfully pray that the Writ of Certiorari sought by the petitioners in this cause to review the order of the United States

Court of Appeals for the Sixth Circuit rendered in this matter on December 5, 1975, which affirmed the prior order of the United States District Court for the Eastern District of Tennessee dismissing this action, be denied and that the orders of the lower courts be affirmed.

PRIOR OPINIONS AND ORDERS IN THIS CAUSE

1. The Opinion of the United States District Court for the Eastern District of Tennessee dismissing this action is set forth at page A1 herein. This opinion is reported in 384 F. Supp. 251.

2. The Judgment of Dismissal entered in the United States District Court for the Eastern District of Tennessee pursuant to the above opinion is set forth at page A13 herein.

3. The Opinion of the United States Court of Appeals for the Sixth Circuit affirming the dismissal of this case is set forth at page A15 herein.

4. The Judgment entered in the United States Court of Appeals for the Sixth Circuit pursuant to their opinion is set forth at page A18 herein.

5. The Order on Mandate entered in the United States District Court for the Eastern District of Tennessee, Southern Division, pursuant to the judgment of the Court of Appeals is set forth at page A20 herein.

All as more fully set forth in the above opinions, this suit has been dismissed upon the ground that the petitioners had no standing to sue.

BLEED THROUGH

JURISDICTION

The petitioners properly invoked the jurisdiction of this Court, pursuant to 28 U.S.C., Sec. 1254(1), and the Petition for Certiorari was timely filed.

QUESTIONS PRESENTED FOR REVIEW

The single and central issue before the Court is the following question:

Did the Petitioners Have Standing to Sue?

This case was originally brought in the Chancery Court of Hamilton County, Tennessee, and thereafter timely removed from said Court to the United States District Court for the Eastern District, Southern Division, by the defendants. Thereafter, the District Court held that the petitioners lacked standing to bring the original suit under Tennessee law and, accordingly, removal jurisdiction failed to exist in the Federal District Court, with the result that the action was dismissed. The District Court further held that a requested amendment by the petitioners seeking to charge some of the defendants with violation of portions of the National Environmental Policy Act, 42 U.S.C., Sec. 4332, was not allowed. The foregoing actions on the part of the District Court were in all things affirmed by the Circuit Court.

Implicit in the central issue are the following subissues:

A. Did the petitioners have standing to bring this suit in the Courts of the State of Tennessee?

B. If petitioners had no standing to bring the initial action in the Tennessee State Courts, did the petitioners acquire standing to bring suit following the removal of this cause to the Federal Court?

C. Did the Federal Court abuse its discretion in failing to allow the requested amendment on the part of the petitioners on possible NEPA issues?

Other issues sought to be raised by the petitioners, such as whether or not there was a violation of NEPA requirements (for example, a possible failure to file an Environmental Impact Statement), whether or not the Chattanooga Housing Authority violated any statute of the State of Tennessee or any provision of the Federal Housing Act, and other like matters, are not proper objects for consideration by this Court as the same deal with the subject matter of this controversy (which was never tried), and while such issues have a bearing on jurisdiction, they have no bearing on the central issue of the petitioners' standing to sue.

STATUTES INVOLVED

1. The Federal Housing Act, and more particularly the following sections of said Act:

42 U.S.C., Sec. 441,
42 U.S.C., Sec. 1455, and
42 U.S.C., Sec. 1446
(now Sec. 1434)

2. The Tennessee "The Housing Authority's Law", being T.C.A. 13-801 through T.C.A. 13-833.

3. The National Environmental Policy Act, 42 U.S.C., Sec. 4321, et seq.

As these statutes are involved in this matter solely because of the initial allegations by the petitioners that the same were violated by some of the defendants, and such violation, or lack thereof, was not an issue passed upon by the lower courts, said statutes are not here set forth in full as the content thereof is not material

BLEED THROUGH

to the issues before the Court, there being no issue raised at any point with respect to whether or not the removal of this cause of action by the defendants from the State Court to the Federal Court was in any way other than proper, as original jurisdiction would have existed in the Federal Court as well as the State Court. The amount in question exceeds the sum of Ten Thousand ($10,000.00) Dollars.

STATEMENT OF THE CASE

Four individuals and an association filed this action on February 13, 1974, to enjoin the construction of an apartment complex to be located on certain real property in an urban redevelopment area located in downtown Chattanooga, Tennessee. The area is commonly known in Chattanooga as the "Golden Gateway", and in part is composed of the remnant of Cameron Hill. Many years prior to the instant controversy, the height of Cameron Hill had been considerably reduced as a part of the freeway program in Chattanooga and the ground from the top of the hill had been used for a freeway fill. The petitioners sought to cancel the deed from the Chattanooga Housing Authority to Cameron-Oxford Associates, said deed being dated December 19, 1973. The petitioners further sought the cancellation of a deed of trust executed by Cameron-Oxford to Milligan-Reynolds Guaranty Title Agency, Inc., as Trustee, on December 19, 1973, said deed of trust securing the payment of a note in the principal sum of $4,210,600.00 payable to the order of the defendant, Advance Mortgage Corporation, the proceeds of said note which were to have been used, and were in fact used, for the construction of the apartment complex upon the Cameron Hill site by Cameron-Oxford. The petitioners further sought the Court to direct the

Chattanooga Housing Authority to hold public hearings with respect to the resale of the property in the event their petition to set aside the sale of the property to Cameron-Oxford by the Housing Authority was allowed. The petitioners sought to enjoin any construction by Cameron-Oxford upon the Cameron Hill site. Additionally, the petitioners sought to reestablish a park upon the Cameron Hill site, there having been many years ago a park located upon said Hill commonly known as Boynton Park. The petitioners filed their action in the Chancery Court of Hamilton County, Tennessee, seeking the relief referred to above. They further requested that the Chancery Court grant to them an immediate show-cause hearing. A number of the defendants timely filed removal petitions (2A, 24A). The removal petitions were proper and the cause was removed to the United States District Court for the Eastern District of Tennessee. The several defendants filed varying responses to the initial complaint, including an Answer and Counter-Claim by the defendant, Cameron-Oxford (27A), a Motion to Dismiss by the Chattanooga Housing Authority, Answers by the defendants, Advance Mortgage and Milligan-Reynolds Guaranty Title Agency, Inc., and other defensive pleading by the other defendants. The issue of the standing on the part of the petitioners to sue was properly raised in all of said defensive pleadings.

A conference was held in the Chambers of the Federal District Judge with regard to the show-cause hearing which had been originally set for March 6, 1974, with the result that the parties (with the consent of the petitioners) agreed that the show-cause hearing was continued until June 27, 1974 (37A-38A). Notwithstanding their agreement, the petitioners on March 13, 1974, again moved the District Judge for an injunction

BLEED THROUGH

enjoining the construction of the apartment complex because of alleged violation by some of the defendants of certain sections of the National Environmental Policy Act (38A). At the same time the petitioners filed a Motion to Amend their original complaint so as to include allegations of alleged violations of NEPA requirements relative to the apartment complex (39A).

This Motion Was Never Granted by the District Judge

On April 11, 1974, the District Court set for hearing the question of whether or not the petitioners had standing to bring this suit in the Tennessee State Court and assert questions of Tennessee law and Federal law and, at the same time, whether or not petitioners' special motion for preliminary injunction pursuant to Rule 65 dealing with the issue of whether or not petitioners were entitled to enjoin the construction of the apartment complex because of the purported failure on the part of the defendants (or some of them) to file an adequate Environmental Impact Statement (43A). No other questions were presented at the hearings which began on April 29, 1974, and continued from time to time until completed on May 13, 1974, and proof on any other issue was not had. At no time were the petitioners allowed to amend their original complaint.

From the testimony at the hearings and from the record, the following facts were affirmatively established:

The urban renewal program, of which the Cameron Hill acreage is a part, was commenced in 1957. As stated above, the project was known as the "Golden Gateway Urban Renewal Program (R 3-4, 447). The area was located in the vicinity of the downtown area and at the time of the commencement of the program was predominantly a blighted residential area. Part and parcel of the renewal plan was the shaving off of

Cameron Hill by some one hundred twenty-five (125) feet, thereby providing a major source of fill dirt for that portion of an interstate highway that bisected the Golden Gateway area. In the process of this dirt movement, Boynton Park was to be destroyed (R 78, 55; 79A).

One of the plaintiffs in this action (Moccasin Bend Association) actively sought to stop the lowering of Cameron Hill. The Association brought an action in the Tennessee State Courts attempting to enjoin the destruction of Boynton Park and the shaving of Cameron Hill. The matter went all the way to the Tennessee Supreme Court and the Association was singularly unsuccessful. Despite the Association's having had its day in Court, at least some of its members understand this action to be primarily an attempt to legally reestablish the existence of Boynton Park and nothing more (R 127, 381-382, 79A).

The general procedure in urban renewal projects is that the local authority in charge of the project is obligated to establish a reuse plan for the acreage to be developed. This plan must be approved by HUD and cannot be changed without that organization's agreement (R 88). The original reuse plan with regard to the Golden Gateway was promulgated in 1958 and was subsequently amended in 1968 (R 82-88). The original plan, as well as the amendment, contemplated that Cameron Hill, after being lowered, would be used for residential purposes with a seven acre plot of the twenty-two acres being made available for commercial development *only* where that commercial development was for the purpose of rounding out the overall residential development (R 20-31, 23-26).

BLEED THROUGH

The Chattanooga Housing Authority in 1969 advertised for proposals for the development of the entire Cameron Hill tract, consistent with the reuse plan (Ex. 37). This was the largest and most complex project in the urban renewal area (R 50). At that time Cameron Hill was within the Chattanooga Fire Zone, requiring substantially more expensive fire-proof construction than outside the zone (R 281-283, 464-466). The invitation to bid required the developer to include the dedication of a public park in his proposal, but left the size and location of the park to the developer (R 11-12, Ex. 37). It also required the developer to include with his proposal "a fully completed and executed statement for Public Disclosure" as required by 42 U.S.C., Sec. 1455(e)(1) (Ex. 137). This requirement was complied with by subsequent successful bidder, i.e., Future Chattanooga Development Corporation.

The only bid submitted on the day the bids were to be opened was that of Future Chattanooga Development Corporation (R 36, 454), which proposed to build a 600-unit apartment complex estimated to cost $12,000,000.00 to $15,000,000.00 (R 36-39), with an offer of $345,000.00 for the public land (See CHA minutes for October 16, 1969, Exhibit 11).

Future Chattanooga Development Corporation's proposal, however, was expressly conditioned upon its being able to obtain the necessary financing for the proposed project, which it had yet to achieve (R 42-43).

In 1970, Cameron Hill was excluded from the fire zone by Chattanooga City Ordinance 17-51, thus permitting substantially cheaper construction (about 20%) than was permitted at the time of the 1969 bidding (R 282-283, 464-466).

Future Chattanooga Development Corporation continued to make a concerted effort to obtain financing for the Cameron Hill project. Its efforts continued to be unsuccessful. In May of 1972 Future Chattanooga Development Corporation proposed to Chattanooga Housing Authority that Broadmoor Shopping Centers, Inc., be allowed to join as a joint venturer in the Cameron Hill project (R 457). Chattanooga Housing Authority agreed to this request and thereafter the joint venturers submitted a revised proposal of development to Chattanooga Housing Authority which did not include certain acreage fronting on Ninth Street in Chattanooga. Chattanooga Housing Authority entered into a contract with the joint venturers on June 9, 1972, which provided for the purchase of the remaining acreage by the joint venturers for $220,000.00. This contract was known to all petitioners herein. The contract price was known to all petitioners herein. No objections were made by the petitioners with regard to the contract at the time it was entered into (June 1972), nor do they in this appeal object to the purchase price as set out in that contract. That contract further provided that the joint venturers would be obligated under the contract only after they were able to obtain the necessary financing (R 43-44).

The joint venturers continued to make efforts to obtain financing up until November 21, 1973, when it was announced in open meeting of Chattanooga Housing Authority that Future Chattanooga Development Corporation was being dissolved and was withdrawing from the project (R 65, 460, 461). It was further announced that a limited partnership was being organized which would be made up of Oxford Development Corporation as the general partner and subsequent

BLEED THROUGH

investors as limited partners. The consent of Chattanooga Housing Authority was given at said meeting to this new arrangement and to the conveyance of the Cameron Hill acreage to the proposed limited partnership.

On November 29, 1973, an Indiana limited partnership was formed, known as Cameron-Oxford Associates, whose certificate was recorded in Hamilton County, Tennessee, on December 12, 1973 (Ex. 47). Said certificate described the Cameron Hill realty as its place of business and showed that the general partner was Oxford, with a five percent interest, with Lyle A. Rosenzweig, Trustee, of Indianapolis, Indiana, being the limited partner, with a ninety-five percent interest, in exchange for $100.00 contributed to the partnership.

On December 19, 1973, Chattanooga Housing Authority executed a special warranty deed to Cameron-Oxford Associates, conveying a portion of the Cameron Hill realty, including approximately 16 acres of the flat 22 acres on top, for the sum of $157,000.00 (Ex. 45, R 102, 489). Chattanooga Housing Authority did this pursuant to the June 9, 1972 contract with Future Chattanooga Development Corporation and Broadmoor Shopping Centers, Inc., to which Cameron-Oxford Associates was not a party (R 103). The deed requires construction by the Grantee of the apartment project as ultimately proposed by Future Chattanooga Development Corporation and Broadmoor Shopping Centers, Inc., to Chattanooga Housing Authority. It is the intention of Chattanooga Housing Authority and Cameron-Oxford Associates that the remainder of Cameron Hill be later conveyed to Cameron-Oxford Associates for similar housing development at a similar

per acre price as otherwise called for by said contract of June 9, 1972. Public disclosure of the principal members and investors in Cameron-Oxford Associates was not completely made by the time this lawsuit was filed due to the fact that the limited partnership interest had not been sold or placed by the general partner, Oxford Development.

Cameron-Oxford commenced preliminary construction of the apartment complex in January of 1974 prior to the institution of this suit. As a part of the plans for the construction, a park site was agreed to by the Housing Authority and Cameron-Oxford, and although technically outside of the record in this cause (but, as admitted by the attorney for the petitioners during the argument of this cause before the Court of Appeals), the park that was to replace old Boynton Park has been set aside and dedicated and is now located upon the public road which enters the apartment complex on the top of the hill. Said park comprises some six acres. The apartment complex is 100% complete and fully rented.

Most importantly, it was established at the hearings that the petitioner, Donald Wamp, owns property within Chattanooga and is accordingly a taxpayer of that city. He is an architect by profession. *His only interest in the subject matter of the lawsuit is derived from his status as a municipal taxpayer and a resident architect.* The petitioners, Mark K. Wilson, Jr., and Carl Gibson, were not identified in the evidentiary hearing, their interest in the lawsuit having been described in the complaint as taxpayers of "Chattanooga and/or Hamilton County, Tennessee". The petitioner, Sherman L. Paul, is a non-resident of Chattanooga, but is a resident of Hamilton County, resid-

BLEED THROUGH

ing on Signal Mountain, Tennessee. He is a former County Tax Assessor and is President of the Moccasin Bend Association. His interest in the lawsuit is derived from his status as a taxpayer of Hamilton County and his position as President of the Moccasin Bend Association. The petitioner, the Moccasin Bend Association, is a non-profit corporation having as one of its purposes the preservation and enhancement of historic and scenic landmarks in the Chattanooga area, including Cameron Hill. The re-establishment of Boynton Park on Cameron Hill in a manner deemed adequate is an area of particular interest to the Association and its members.

Suffice it to say in summary, the interest of each individual petitioner is that of a civic-minded taxpayer of the City or County wherein Cameron Hill is located. The interest of the corporate petitioner is that of an association concerned with the preservation of local scenic and historic landmarks. Neither petitioner asserts any ownership in Cameron Hill or any economic or financial interest in its disposition other than as taxpayers or, in the case of Moccasin Bend Association, as a civic improvement organization. Nor do they claim any special injury to themselves, different from that which might be asserted by any civic-minded taxpayer or by any association concerned with the preservation and enhancement of local areas having scenic and historic attributes.

Following the hearings and before any trial of the case, the Federal Judge dismissed the complaint for the reasons set forth in his Opinion dated September 19, 1974 (A1 herein), because of a lack of standing on the part of the petitioners to bring the action under Tennessee law, and the Judge's ruling was duly affirmed

by the Court of Appeals (See their Opinion, which is A15 herein).

ARGUMENT

I.

The Petitioners Do Not Have Standing to Sue Pursuant to the Law of the State of Tennessee

It is well established in the State of Tennessee that citizens and taxpayers are without standing to maintain a lawsuit with respect to the restraint or direction of governmental action unless they allege and establish that they will suffer some special injury not common to citizens and taxpayers generally. This rule is well established in the State of Tennessee and the two leading cases involved, both of which are thoroughly discussed by the District Judge in his Opinion, are *Patton* v. *City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901) and *Badgett* v. *Rogers*, 222 Tenn. 374, 436 S.W. 2d 292 (1968). The plaintiffs admitted the rule but merely take issue with its interpretation or, to be more precise, they maintain that the original complaint filed herein comes within the exceptions to the general rule set out in *Badgett*. The Court below occupied itself with this insistence and observed that:

> "With regard to the contention of the individual plaintiff-taxpayers that they come within the exception announced in *Badgett* v. *Rogers*, supra, affording standing to a taxpayer to litigate an alleged misuse of public funds, there are two difficulties. The first is that the exception stated in the *Badgett* case refers only to the misuse of public funds, not to the misuse of public property.

BLEED THROUGH

> The present case involves the alleged mismanagement of property in an urban renewal project. Each case cited in the *Badgett* case in support of the exception therein stated pertains to the levying of an unlawful tax or the unlawful expenditure of public funds. The plaintiffs have cited no Tennessee case and the Court has been unable to find one wherein the courts of Tennessee have allowed a taxpayer claiming no special injury to maintain a suit for mismanagement of public property."
>
> "In the second place, while the complaint avers many irregularities upon the part of the Chattanooga Housing Authority in the disposition of the Cameron Hill tract and the evidence reflects that a number of unusual, if not questionable, practices were followed by that agency in the negotiation and awarding of a contract disposing of the Cameron Hill tract, the Court, with but one possible exception, is unable to find any specific instance of illegal conduct on the part of the Chattanooga Housing Authority or any other defendant with regard to that disposition. Rather, each action appears to have been within the legislative or administrative authority or discretion of the various agencies and defendants involved." (75A, 76A).

The decision of the District Court with regard to this contention made by the petitioners becomes even more understandable when one reads that portion of *Badgett* which deals with not only the general rule of law in this area but the exception to that rule:

> "Thus, without averment by the complaining litigant of a special interest, status or wrong, the courts have not permitted citizens to interfere with

the granting of a franchise, *Patton* v. *Chattanooga* (1901), 108 Tenn. 197, 65 S.W. 414; with a municipal contract, *Wilkins, et al.* v. *Chicago, St. Louis and New Orleans Railroad Co., et al.* (1903), 110 Tenn. 422, 75 S.W. 1026; with the initiation of new housing projects, *Walldorf, et al.* v. *City of Chattanooga, et al.* (1951), 192 Tenn. 86, 237 S.W. 2d 939; with the selection of county officials, *Buford, et al.* v. *State Board of Elections* (1960), 206 Tenn. 480, 334 S.W. 2d 726, or, with the relocation of school facilities, *Reams* v. *Board of Mayor and Aldermen of McMinnville* (1927), 155 Tenn. 222, 291 S.W. 1067."

"However, the courts have recognized an exception to the general rule where it is asserted that the assessment or levy of a tax is illegal or that public funds are misused or unlawfully diverted from stated purposes."

"Thus, relief has been granted where officials entered into a contract which would have diverted funds from their authorized purpose, *Pope, et al.* v. *Dykes, et al.* (1905), 116 Tenn. 230, 93 S.W. 85; where the unconstitutional formation of a new county was underway, *Ford* v. *Farmer, et al.* (1848), 28 Tenn. 152; where the purpose of an appropriation did not clearly appear, *Southern* v. *Beeler, et al.* (1946), 183 Tenn. 272, 195 S.W. 2d 857; where a tax was levied without statement of the purpose for which the tax yield would be used, *Southern Railroad Company* v. *Hamblen County* (1905), 115 Tenn. 526, 92 S.W. 238; *Southern Railroad Company, et al.* v. *Hamblen County, et al.* (1906), 117 Tenn. 327, 97 S.W. 455; and where tax funds were used for other than their prescribed

BLEED THROUGH

purpose, *Kennedy* v. *Montgomery County* (1897), 98 Tenn. 165, 38 S.W. 1075." 436 S.W. 2d 292, pp. 294-295.

There is no testimony in the record or factual basis for any finding that the petitioners come within the exception referred to in the *Badgett* case. There are no allegations of or proof with respect to any misuse or misapplication of public funds. There is complaint that the Chattanooga Housing Authority did not properly comply with the procedures established by law in its dealing with the defendant, Cameron-Oxford, and with Future Chattanooga, but these are administrative matters not subject to review, and do not involve any alleged misapplication of funds or tax monies. The only real grievance which the petitioners have is their subjective thought that the residue of Cameron Hill might be better used for some other purpose (or some more expensive housing project) than, in fact, the same was utilized for, and further that Boynton Park as re-established is not as pretty a park (in their opinion) as the same existed many years ago. It follows that the main thrust of the complaint therefore is not an alleged misuse of public lands, funds, or any other item. It is simply that the petitioners disagree with the use and, in particular, with the size and location of the new Boynton Park, and it must follow that this subjective thought process can in no way be interpreted, distorted, or squeezed so as to fit the exception in the *Badgett* rule. The petitioners, accordingly, clearly fall within the "general rule of long standing in Tennessee, individual citizens and taxpayers may not interfere with, restrain or direct official acts, when such citizens fail to allege and prove damages or injuries to themselves different in character and kind from those sustained by the

public at large." *Badgett* v. *Rogers*, 222 Tenn. 374, 436 S.W. 2d 292 (1968).

The lower courts correctly applied the Tennessee controlling decisions with respect hereto.

II.

There Was No Abuse of Discretion on the Part of the District Judge in Failing to Allow Petitioners' Requested Amendment Based Upon Alleged Violations of NEPA.

The Court below did not allow petitioners' Motion to Amend their original complaint, which Amendment would have added an allegation of a violation of the National Environmental Policy Act. In not allowing the amendment it is the contention of the petitioners that the Court was in error, but the petitioners apparently make no claim that the Court abused its discretion in denying the amendment. Several of the parties, including the defendant, Cameron-Oxford, had filed an Answer prior to the time the amendment was offered. In fact, Cameron-Oxford had filed a Counter-Claim. It results that the action on the part of the Federal Judge is not susceptible to review on appeal except in those instances where the District Judge abuses his discretion. There was no complaint before the Court of Appeals with respect to such alleged abuse of discretion and no express complaint to that effect in this court. The foregoing rule is well established. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Comie* v. *Buehler Corp.*, 449 F. 2d 644 (CA 9th 1971); *Hale* v. *Ralston Purina Co.*, 432 F. 2d 156 (CA 8th 1970).

BLEED THROUGH

III.

The Jurisdiction of a Federal Court Upon Removal Is a Derivative Jurisdiction and If the State Court Lacked Jurisdiction, So Does the Federal Court.

As has been established, under Tennessee law the petitioners had no standing to bring this suit. In any event, no State Court has jurisdiction over HUD and/or FHA to review any administrative act of either agency with regard to this project. State Court jurisdiction with respect to HUD projects is limited to certain violations of constitutional rights and/or rights in certain areas with respect to condemnation, none of which is involved here. See *City of Buffalo* v. *Mollenberg-Betz Mach. Co.*, 279 N.Y.S. 2d 842 (1955), and *Green St. Assn.* v. *Daley*, 373 F. 2d 1 (CA 7th 1967), Cert. Denied, 387 U.S. 932. Whether or not a complaint sounds in alleged violation of Federal statutes, or whether or not such a complaint arises solely from common law or State statutory violations, the fact remains that to bring suit plaintiffs must have standing. Standing is not to be confused with jurisdiction. Standing is a State Court question in this suit even though Federal statutes were involved in the subject matter sought to be reviewed in the Court, and the Court of Appeals correctly holds and affirms the foregoing rule as follows:

> "In *Lambert Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382 (1922), the Supreme Court, speaking through Mr. Justice Brandeis, said:
>
> > The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like

suit originally brought there have had jurisdiction.

Lambert was followed and applied in this court in *Bancohio* v. *Fox*, 516 F.2d 29 (6th Cir. 1975), in which numerous other decisions are cited to the same effect. See also *Friedr. Zoellner Corp.* v. *Tex. Metals Co.*, 396 F.2d 300, 301 (2d Cir. 1968).

Even if federal standing decisions were applicable, appellants would be met by the decisions of this Court in *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (6th Cir. 1973), cert. denied, 414 U.S. 1068 (1973); and *South Hill Neighborhood Association* v. *Romney*, 421 F.2d 454 (6th Cir. 1969), cert. denied, 397 U.S. 1025 (1970)."

IV.

The Proposed Reestablishment of Boynton Park Confers No Standing Upon Petitioners.

As pointed out in the courts below, these petitioners are both equitably and judicially estopped from what it would appear is the true purpose of their complaint, i.e., the reestablishment of Boynton Park in the grand manner that they would envision. It is to be remembered that the petitioner, Moccasin Bend Association (with others), some years prior to the instant suit had brought another suit against the Chattanooga Housing Authority seeking to restrain the Housing Authority from abolishing Boynton Park and changing the natural contours of Cameron Hill. In an unpublished opinion entered on November 9, 1962, the Supreme Court of Tennessee held:

"The litigation resulted in an adjudication by the Tennessee Supreme Court that 'the bill fails to show any proposed illegal action of the Housing

BLEED THROUGH

Authority' and 'these complainants are entitled to no rights in Boynton Park other than those common to all citizens of Chattanooga'. See, *Mrs. Sim Perry Long, et al.* v. *Chattanooga Housing Authority, et al.* (unpublished opinion entered November 9, 1962)."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Writ of Certiorari sought by the petitioners to review the action of the United States Court of Appeals for the Sixth Circuit approving the decision of the United States District Court for the Eastern District of Tennessee, Southern Division, be denied and that the judgments of said courts be in all things affirmed.

Respectfully submitted,

GEORGE L. FOSTER
HALL, HAYNES, LUSK & FOSTER
615 Pioneer Building
Chattanooga, Tennessee 37402
Attorney for the Respondents, Advance Mortgage Corporation and Milligan-Reynolds Guaranty Title Agency, Inc.

JAMES W. GENTRY, JR.
GENTRY & BOEHM
650 Pioneer Building
Chattanooga, Tennessee 37402
Attorney for Respondent, Cameron-Oxford Associates

May 5, 1976

BLEED THROUGH

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

CIV-1-74-41

DONALD L. WAMP; MARK K. WILSON, JR.; CARL L. GIBSON; SHERMAN L. PAUL; and MOCCASIN BEND ASSOCIATION, a Tennessee non-profit corporation,

Plaintiffs

-vs.-

CHATTANOOGA HOUSING AUTHORITY, a Tennessee corporation; CITY OF CHATTANOOGA, TENNESSEE, a municipal corporation; CAMERON-OXFORD ASSOCIATES, an Indiana limited partnership; ADVANCE MORTGAGE CORPORATION, a Delaware corporation; MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., a Tennessee corporation; THE UNITED STATES OF AMERICA, ex rel the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also ex rel the FEDERAL HOUSING ADMINISTRATION,

Defendants

OPINION

(Filed September 19, 1974)

This is an action in which the plaintiffs seek to enjoin the construction of an apartment complex upon Cameron Hill, a local landmark within an urban re-

newal project in Chattanooga, Tennessee. The plaintiffs seek further to obtain a cancellation of the deeds and contracts between the developer and the government agencies in interest and to compel a re-evaluation, re-solicitation, and redisposition of the Cameron Hill tract. The lawsuit was filed in the state court and removed to this court. It is presently before this Court upon the following motions: (1) motions on behalf of the defendants, Chattanooga Housing Authority and the City of Chattanooga, to dismiss the complaint for lack of standing on the part of the plaintiffs to maintain the lawsuit (Court File #8 and #11); (2) motion on behalf of the plaintiffs for a preliminary injunction (Court File #17); (3) motion on behalf of the plaintiffs to amend their complaint so as to allege a cause of action for violation of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c) (Court File #18); and (4) motion on behalf of the defendant, Chattanooga Housing Authority, for summary judgment (Court File #29). An evidentiary hearing extending over portions of three days was held on the plaintiffs' motion for a temporary injunction and the case is now before the Court upon the record thus established.

A threshold question in this lawsuit is with reference to the removal jurisdiction of this Court, for, as noted, this lawsuit was filed in the state court and removed to this court. The defendants, the United States Department of Housing and Urban Development (HUD) and the Federal Housing Authority (FHA), petitioned for removal, averring federal agency removal jurisdiction under 28 U.S.C. § 1346(a)(2) and § 1441(a). The other defendants petitioned for removal averring federal question removal jurisdiction under 28 U.S.C. § 1331 and § 1441. The parties have raised no issue regarding removal jurisdiction but the defendants have

BLEED THROUGH

each asserted a lack of standing upon the part of the plaintiffs to maintain the lawsuit. That assertion of necessity raises the issue of removal jurisdiction, for a finding of a lack of standing would prevent the existence of a "case or controversy," a prerequisite to federal court jurisdiction under Article III of the Federal Constitution. (*Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970); *Sierra Club* v. *Morton*, 405 U.S. 727, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972). In the absence of jurisdiction, no right of removal could exist.

In considering the issue of standing, further principles of removal law must be borne in mind. The first such principle is that the right of removal must have existed as of the time removal was attempted and the pleadings must be viewed accordingly. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 95 L. Ed. 702, 71 S. Ct. 534 (1951); *McLeod* v. *Cities Service Gas Co.*, 233 F. 2d 242 (10th Cir., 1956). Developments in the lawsuit or attempted amendments to the pleadings subsequent to removal cannot serve to confer federal court jurisdiction if none in fact existed as of the time of removal. Accordingly, the jurisdictional issue must be resolved before the Court can consider the plaintiffs' post-removal motion to amend their complaint or the plaintiffs' motion for a temporary injunction.

A second principle of removal law that must be borne in mind is that jurisdiction in the state court is also a prerequisite to removal of a lawsuit to the federal court, as federal court removal jurisdiction is to this extent derivative. In the absence of state court jurisdiction, a dismissal rather than a remand of the lawsuit is required. *Lambert Run Coal Co.* v. *Balti-*

more & O. R. Co., 258 U.S. 377, 66 L. Ed. 671, 42 S. Ct. 349 (1922); *Venner* v. *Michigan Central R. Co.*, 271 U.S. 127, 70 L. Ed. 868, 46 S. Ct. 444 (1926); *Freeman* v. *Bee Machine Co.*, 319 U.S. 448, 87 L. Ed. 1509, ... S. Ct. .... (1943). *See also* Moore's FEDERAL PRACTICE, Vol. 1A, § 0.164[2] note 41 and § 0.157[3].

It is appropriate, therefore, to look initially to the issue of jurisdiction in the state court prior to removal. It is also appropriate to note that the lack of standing of a party to maintain a lawsuit has been held to be jurisdictional in the Chancery Courts of Tennessee. In *Patton* v. *Chattanooga*, 108 Tenn. 197, wherein the issue was with regard to the standing of a taxpayer to maintain an action in chancery court against a municipality, the rule was stated thusly at page 227:

> "Thus examined, the Tennessee cases show that the court had *jurisdiction* to pass on questions, admittedly of a judicial nature, only when such *jurisdiction* is invoked 'by those having a special or peculiar interest in the question and there are none to the contrary'." (Emphasis supplied)

With regard to the interest of the plaintiffs in this lawsuit, the original complaint avers that each of the four individual plaintiffs "is a taxpayer to the City of Chattanooga, Tennessee and/or Hamilton County, Tennessee". The plaintiff, Moccasin Bend Association, is averred to be a non-profit corporation having as one of its primary concerns "the proper development of Cameron Hill and Moccasin Bend, prominent local historical landmarks". The complaint then proceeds to aver that some 15 years ago the Chattanooga Housing Authority acquired certain property in or adjacent to the downtown commercial area of Chatta-

BLEED THROUGH

nooga in the course of an urban renewal project known as the "Golden Gateway Urban Renewal Project". Included within the property acquired was Cameron Hill, which in turn included a previously existing municipal park known as "Boynton Park". It is further averred that in December of 1973 the defendant, Chattanooga Housing Authority, effected a sale of the Cameron Hill tract to the defendant, Cameron-Oxford Associates, a limited partnership, upon the commitment of the latter to erect an apartment complex on the tract. Various irregularities are alleged on the part of the Chattanooga Housing Authority in planning for the use of the Cameron Hill tract and in effecting a sale of that tract, including (a) failure to permit adequate public participation in planning for the use of the tract, (b) failure to achieve the most beneficial use of the tract, (c) failure to re-establish an adequate replacement for Boynton Park, (d) failure to follow open competitive bidding in effecting a sale of the tract, (e) failure to obtain an adequate price for the tract, (f) failure to require disclosure of the true identity of the purchaser-developer, (g) improperly permitting delays on the part of the purchaser-developer in submitting a firm proposal and in initiating improvements, and (h) failure to give adequate public notice of the various activities hereinabove referred to. The co-defendants are alleged to have participated in one manner or another in the foregoing improper activities of the Chattanooga Housing Authority.

The defendants, both by motion and in their answers, deny standing upon the part of the plaintiffs to maintain this lawsuit.

In connection with the evidentiary hearing upon the plaintiffs' motion for a temporary injunction, the fol-

lowing facts having reference to the issue of standing were made to appear. The plaintiff, Donald Wamp, owns property within Chattanooga and is accordingly a taxpayer of that city. He is an architect by profession. His only interest in the subject matter of the lawsuit is derived from his status as a municipal taxpayer and a resident architect. The plaintiffs, Mark K. Wilson, Jr. and Carl Gibson, were not identified in the evidentiary hearing, their interest in the lawsuit having been described in the complaint as taxpayers of "Chattanooga and/or Hamilton County, Tennessee". The plaintiff, Sherman L. Paul, is a non-resident of Chattanooga, but is a resident of Hamilton County, residing on Signal Mountain, Tennessee. He is a former county tax assessor and is President of the Moccasin Bend Association. His interest in the lawsuit is derived from his status as a taxpayer of Hamilton County and his position as President of the Moccasin Bend Association. The plaintiff, the Moccasin Bend Association, is a non-profit corporation having as one of its purposes the preservation and enhancement of historic and scenic landmarks in the Chattanooga Area, including Cameron Hill. The re-establishment of Boynton Park on Cameron Hill in a manner deemed adequate is an area of particular interest to the association and its members.

Suffice it to say in summary, the interest of each individual plaintiff is that of a civic minded taxpayer of the city or county wherein Cameron Hill is located. The interest of the corporate plaintiff is that of an association concerned with the preservation of local scenic and historic landmarks. Neither plaintiff asserts any ownership in Cameron Hill or any economic or financial interest in its disposition other than as taxpayers or, in the case of Moccasin Bend Association,

BLEED THROUGH

as a civic improvement organization. Nor do they claim any special injury to themselves, different from that which might be asserted by any civic minded taxpayer or by any association concerned with the preservation and enhancement of local areas having scenic and historic attributes.

The rule in Tennessee is well established that citizens and taxpayers are without standing to maintain a lawsuit to restrain or direct governmental action unless they first allege and establish that they will suffer some special injury not common to citizens and taxpayers generally. *Patton* v. *City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901). The reasons for the rule, as given in the *Patton* case, were variously stated to be that "Courts do not sit to declare abstract propositions of law" and that, "in matters common to all citizens, the law confers upon the duly elected representatives of the people the sole right to appeal to the courts for redress" and that "if the cities could not exercise public powers, even erroneously or unwisely, when lawfully done by their constituted legislative authority, without the concurrence of every citizen or taxpayer, it would be impossible to have municipal governments. . ." In the rather recent case of *Badgett* v. *Rogers*, 222 Tenn. 374, 436 S.W.2d 292 (1968), the Tennessee Supreme Court stated the rule to be as follows:

> "As a general rule of long standing in Tennessee, individual citizens and taxpayers may not interfere with, restrain or direct official acts, when such citizens fail to allege and prove damages or injuries to themselves different in character or kind from those sustained by the public at large."

The plaintiffs contend, however, that the allegations and facts in the present case bring them within an exception to the general rule, that exception being that a taxpayer may sue without averring or establishing any special injury where an illegal use of public funds is involved. The exception relied upon by the plaintiffs is stated as follows in *Badgett* v. *Rogers*, *supra*, 456 S.W.2d 292 at 294:

> "However the courts have recognized an exception to the general rule where it is asserted that the assessment or levy of a tax is illegal or that public funds are misused or unlawfully diverted from stated purposes."

Having thus stated the exception, it should be noted that the Court in the *Badgett* case nevertheless disallowed an action wherein a taxpayer sought to attack the legality of an expense allotment to a mayor, the expense allotment being in addition to his salary. The disallowance was predicated upon the conclusion that the taxpayer had made insufficient allegations of fact regarding the illegality of the expense allotment.

Under the allegations of the complaint, as well as under the facts as hereinabove found by the Court, it would appear that the plaintiffs were without standing to maintain this lawsuit in the Chancery Court of the State of Tennessee wherein it was originally filed. There is no contention made or evidence submitted that the plaintiffs, by reason of the matters complained of, have sustained any special injury or any injury other than that common to all civic minded taxpayers. In fact, the plaintiff, Moccasin Bend Association, does not even assert the status of a taxpayer. With regard to the contention of the individual plaintiff-taxpayers that they come within the exception announced in

BLEED THROUGH

Badgett v. *Rogers, supra*, affording standing to a taxpayer to litigate an alleged misuse of public funds, there are two difficulties. The first is that the exception stated in the *Badgett* case refers only to the misuse of public funds, not to the misuse of public property. The present case involves the alleged mismanagement of property in an urban renewal project. Each case cited in the *Badgett* case in support of the exception therein stated pertains to the levying of an unlawful tax or the unlawful expenditure of public funds. The plaintiffs have cited no Tennessee case and the Court has been unable to find one wherein the courts of Tennessee have allowed a taxpayer claiming no special injury to maintain a suit for mismanagement of public property.

In the second place, while the complaint avers many irregularities upon the part of the Chattanooga Housing Authority in the disposition of the Cameron Hill tract and the evidence reflects that a number of unusual, if not questionable, practices were followed by that agency in the negotiation and awarding of a contract disposing of the Cameron Hill tract, the Court, with but one possible exception, is unable to find any specific instance of illegal conduct on the part of the Chattanooga Housing Authority or any other defendant with regard to that disposition. Rather, each action appears to have been within the legislative or administrative authority or discretion of the various agencies and defendants involved.

The only statutory provisions cited to the Court and contended to have been violated under the allegations of the complaint as filed in the state court were the provisions of section 1455(a)(ii) of Title 42 U.S.C. and T.C.A. § 13-821, wherein the agencies responsible

for urban renewal projects were required to "afford maximum opportunity" to private enterprise to effect redevelopment, and the provisions of section 1455(e)(1) of Title 42 U.S.C. wherein the local agency in charge of an urban renewal project is required, as a condition precedent to the awarding of a contract, to make public disclosure of "the name of the redeveloper . . . its officers and principal members, shareholders and investors, and other interested parties". There is no evidence of a violation of section 1455(a)(ii) or T.C.A. § 13-821. The Chattanooga Housing Authority does appear to have entered into a contract with a developer, Cameron-Oxford Associates, a limited partnership listing a trustee as the limited partner having a 95% partnership interest, but without making or requiring any public disclosure of equitable owners or beneficiaries of the trust. Whether this omission would constitute a sufficiently substantial failure on the part of the Chattanooga Housing Authority to constitute a statutory violation or whether such a violation would render any contract thereafter entered into void or voidable at the instance of the Chattanooga Housing Authority, the H.U.D., the F.H.A., or the United States attorney acting under his general authority, the Court does not here decide. Suffice it to say that such illegality, if in fact it be an illegality, affords no standing under Tennessee law to a taxpayer suffering no special injury therefrom to litigate the issue.

With regard to agency guidelines, a Chattanooga Housing Authority guideline alleged to have been violated was one providing that urban renewal tracts should be disposed of "under open competitive conditions". The evidence is undisputed that Chattanooga Housing Authority did solicit bids under "open competitive conditions", but, receiving only one bid, there-

BLEED THROUGH

upon proceeded to engage in extensive, prolonged and private negotiations with the bidder, its successors and assigns, for the disposition of the Cameron Hill tract. Such action on the part of a public agency dealing with public property was, in the Court's opinion, most inappropriate. It does not appear to have been in violation of any law.

Another agency guideline alleged to have been violated was the requirement that urban renewal tracts be disposed of for "fair value" and "in a fair and equitable manner". H.U.D. having approved the sale here under attack, both the generality of the guidelines and the nature of the evidence provide no basis for the substitution of judicial discretion in lieu of agency discretion as to whether the disposition was effected in a "fair and equitable manner" or as to what may have been a "fair value" for the property under the limitations and conditions of the sale.

It is the further insistence of the plaintiffs that the defendants, and in particular the Chattanooga Housing Authority, acted illegally in failing to re-establish a park of adequate size and appropriate location on Cameron Hill to replace the former Boynton Park. The plaintiffs' contention in this regard appears to be that the title of Chattanooga Housing Authority to the Cameron Hill tract was impressed with a trust to this effect. The evidence fails to reflect, however, that the Chattanooga Housing Authority held title to the Cameron Hill tract subject to any such equitable encumbrance or duty. Rather, it appears that the Chattanooga Housing Authority acquired clear title to the entire Cameron Hill tract some 15 years ago, including the former municipal park located thereon. Cameron Hill has remained undeveloped and unused since its acquisition by the Chattanooga Housing Authority. In fact, some 10

or 12 years ago the entire top portion of the hill was removed to acquire fill material for a highway project. At that time litigation was initiated by citizens and taxpayers against the Chattanooga Housing Authority in an effort to prevent the dispoilation of the hill and to preserve the Boynton Park area. The litigation resulted in an adjudication by the Tennessee Supreme Court that "the bill fails to show any proposed illegal action of the Housing Authority" and "these complainants are entitled to no rights in Boynton Park other than those common to all citizens of Chattanooga". *See Mrs. Sim Perry Long, et al.* v. *Chattanooga Housing Authority, et al.* (unpublished opinion entered November 9, 1962).

The Court is of the opinion that no genuine issue of fact exists but that the plaintiffs were without standing to maintain this lawsuit in the Chancery Court of Hamilton County, Tennessee, wherein it was originally filed and wherein it was pending at the time of removal to this court. The plaintiffs being without standing to maintain the lawsuit, the Tennessee Chancery Court was without jurisdiction to entertain the lawsuit. The state court being without jurisdiction, this Court is, by derivation, likewise without jurisdiction. The lawsuit must accordingly be dismissed.

In view of the conclusion herein reached, it becomes unnecessary and inappropriate to consider the further contentions and motions in the case, including the contentions of the parties with regard to the plaintiffs' standing or lack of standing under the federal law, and including the plaintiffs' motions to amend their complaint and for a temporary injunction.

An order will enter dismissing this lawsuit for lack of jurisdiction.

/s/ Frank W. Wilson
United States District Judge

BLEED THROUGH

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

CIV-1-74-41

DONALD L. WAMP; MARK K. WILSON, JR.; CARL L. GIBSON; SHERMAN L. PAUL; and MOCCASIN BEND ASSOCIATION, a Tennessee non-profit corporation,

Plaintiffs

-vs.-

CHATTANOOGA HOUSING AUTHORITY, a Tennessee corporation; CITY OF CHATTANOOGA, TENNESSEE, a municipal corporation; CAMERON-OXFORD ASSOCIATES, an Indiana limited partnership; ADVANCE MORTGAGE CORPORATION, a Delaware corporation; MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., a Tennessee corporation; THE UNITED STATES OF AMERICA, ex rel the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also ex rel the FEDERAL HOUSING ADMINISTRATION,

Defendants

JUDGMENT OF DISMISSAL

(Filed September 19, 1974)

This is an action in which the plaintiffs seek injunctive relief with reference to a tract of land within an urban renewal project. The case is presently before the Court upon various motions, including motions by

the defendants for summary judgment. For the reasons set forth in an opinion filed herein, it is the judgment of the Court that the case should be dismissed for lack of jurisdiction.

It is accordingly ORDERED that the defendants' motion for summary judgment be sustained and that the lawsuit be and the same is hereby dismissed for lack of jurisdiction.

APPROVED FOR ENTRY.

/s/ Frank W. Wilson
United States District Judge

BLEED THROUGH

No. 75-1192

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DONALD L. WAMP, ET AL.,
Plaintiffs-Appellants,

v.

CHATTANOOGA HOUSING AUTHORITY, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed December 5, 1975.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PER CURIAM. This action was filed to enjoin the construction of an apartment complex on Cameron Hill, a local landmark in Chattanooga, Tennessee, where municipally owned Boynton Park formerly was located. The suit was initiated in the State Chancery Court and was removed by the defendant to the United States District Court.

In an opinion published at 384 F.Supp. 251 (E.D. Tenn. 1974), Chief District Judge Frank W. Wilson held that the plaintiffs did not have standing under Tennessee law to maintain the suit in Tennessee Chan-

cery Court and that the District Court therefore had no removal jurisdiction. Accordingly, the action was dismissed. Plaintiffs appeal. Reference is made to the reported decision of the District Court for a recitation of the pertinent facts.

Appellants contend that the District Court incorrectly construed the relevant Tennessee decisions and, therefore, they have standing to sue under Tennessee state law. We hold that the District Court correctly construed and applied the controlling decisions of the Supreme Court of Tennessee. *Sachs* v. *County Election Commission*, 525 S.W.2d 672, 673 (Tenn. 1975); *Bennett* v. *Stutts*, 521 S.W.2d 575, 576 (Tenn. 1975); *Badgett* v. *Rogers*, 436 S.W.2d 292, 294 (Tenn. 1968); *Patton* v. *City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901).

The Supreme Court of Tennessee ruled to the same effect in its decision in another case involving the Cameron Hill area in Chattanooga. In an action filed in Chancery Court, a group of interested citizens and taxpayers sought to enjoin the Chattanooga Housing Authority and the City of Chattanooga from altering or changing the natural contours or topography of Boynton Park and abolishing it as a public park. In an unpublished decision announced November 9, 1962, the Supreme Court of Tennessee said:

> Second, these complainants are entitled to no rights in Boynton Park other than those common to all citizens of Chattanooga.
>
> Tennessee decisions holding as above stated are legion. It is said that the leading case is Patton v. Chattanooga, 108 Tenn. 197.

It is further asserted by appellants that, even if the District Court was correct in its interpretation of

BLEED THROUGH

Tennessee law, they have standing as a matter of federal law. We agree with the District Court that if appellants had no standing to maintain the action in the State court, the District Court had no removal jurisdiction.[1]

In *Lambert Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382 (1922), the Supreme Court, speaking through Mr. Justice Brandeis, said:

> The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction.

Lambert was followed and applied in this court in *Bancohio* v. *Fox*, 516 F.2d 29 (6th Cir. 1975), in which numerous other decisions are cited to the same effect. *See also Friedr. Zoellner Corp.* v. *Tex. Metals Co.*, 396 F.2d 300, 301 (2d Cir. 1968).

The decision of the District Court is affirmed. Costs on this appeal are taxed against appellants.

---

1. Even if federal standing decisions were applicable, appellants would be met by the decisions of this court in *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (6th Cir. 1973), cert. denied, 414 U.S. 1068 (1973); and *South Hill Neighborhood Association* v. *Romney*, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1192

DONALD L. WAMP, ET AL.,
Plaintiffs-Appellants,

v.

CHATTANOOGA HOUSING AUTHORITY, ET AL.,
Defendants-Appellees.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

JUDGMENT

(Filed December 5, 1975)

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal,

BLEED THROUGH

as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.

/s/ John P. Hehman
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

CIVIL ACTION NO. 1-74-41

DONALD L. WAMP, et al.
Plaintiffs

v.

CHATTANOOGA HOUSING AUTHORITY, et al.

ORDER ON MANDATE

The plaintiffs-appellants having appealed to the United States Court of Appeals for the Sixth Circuit from the judgment of the District Court entered on September 19, 1974, dismissing the case, and the United States Court of Appeals for the Sixth Circuit having entered its judgment on December 5, 1975, issued as mandate on January 8, 1976, and received and filed herein by the Clerk on January 9, 1976, wherein it was ordered that the judgment of the District Court be affirmed;

Now, therefore, upon the mandate of the United States Court of Appeals for the Sixth Circuit issued January 8, 1976, and received and filed herein by the Clerk on January 9, 1976, it is ORDERED and ADJUDGED that the judgment entered herein on the 19th day of September, 1974, be and the same is hereby made final.

ENTER:

/s/ Frank W. Wilson
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1252

DONALD L. WAMP, ET AL., PETITIONERS

v.

CHATTANOOGA HOUSING AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A15-A17) is reported at 527 F. 2d 595. The opinion of the district court (Pet. App. A1-A12) is reported at 384 F. Supp. 251.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1975 (Pet. App. A18-A19). The petition for a writ of certiorari was filed on March 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the courts below correctly concluded that petitioners lacked standing under state law and that, as a consequence, the district court upon removal was without jurisdiction of this action.

STATEMENT

Petitioners, three individuals and a non-profit corporation organized under the laws of Tennessee, brought this action in the Chancery Court of Hamilton County, Tennessee, naming as defendants the City of Chattanooga and the Chattanooga Housing Authority ("the municipal respondents"), a real estate developer, its lender, and the holder of its deed of trust ("the private respondents"), and the United States on behalf of the Department of Housing and Urban Development and the Federal Housing Administration ("the federal respondents") (C.A. App. 5a-8a, 13a-14a).[1] Petitioners sought to enjoin the construction of a federally-assisted apartment complex on Cameron Hill, which is located within an urban renewal area in Chattanooga, Tennessee (Pet. App. A1-A2). They also sought to cancel the deeds and contracts for the construction project and to compel the reevaluation, resolicitation and redisposition of the property involved (Pet. App. A2). Petitioners did not seek any affirmative relief against the federal respondents.

On motion of all respondents, the action was removed to the United States District Court for the Eastern District of Tennessee. Petitioners then sought to amend their complaint to allege that the federal respondents' failure to file an environmental impact statement for the housing project violated the National Environmental Policy Act, 83 Stat. 853, 42 U.S.C. 4332(2)(c) (Pet. App. A2; C.A. App. 39a-42a). The amended complaint sought to be filed by petitioners also alleged that members of the petitioner corporation, the Moccasin Bend Association, had used the park that had existed on Cameron Hill before renewal of the area had begun.

---

[1] "C.A. App." refers to the joint appendix filed in the court of appeals.

Following an evidentiary hearing, the district court dismissed the action for lack of jurisdiction (Pet. App. A13-A14). The court held that the existence of jurisdiction in the court from which the action had been removed was an essential prerequisite to its jurisdiction upon removal, and that it was without jurisdiction because petitioners did not have standing under Tennessee law (Pet. App. A2-A12). The court of appeals affirmed (Pet. App. A15-A19). In addition to sustaining the district court's holding that petitioners lacked jurisdiction under Tennessee law, the court of appeals indicated that they also lacked standing under federal law (Pet. App. A17, n. 1).[2]

ARGUMENT

Since the jurisdiction of a federal court over an action removed from a state court depends upon whether the state court possessed jurisdiction, the courts below properly sought to determine whether petitioners had standing to bring this action under Tennessee law. The courts' holding that petitioners lacked standing under Tennessee law is correct and, in any event, is not an issue warranting review by this Court. Petitioners also lacked standing under federal law and, as a consequence, the choice-of-law question discussed by petitioners is not properly presented in this case.

1. It has long been settled, as stated by Mr. Justice Brandeis in *Lambert Co.* v. *Baltimore and Ohio R.R. Co.*, 258 U.S. 377, 382, that the jurisdiction of a federal court

---

[2]While the case was pending in the court of appeals, the municipal and private respondents advised the court that the construction that petitioners sought to enjoin had been substantially completed and that some of the units in the housing project were occupied. Joint Brief of Defendants-Appellees, City of Chattanooga and the Chattanooga Housing Authority, p. 6; Combined Brief for Defendants Appellees Cameron-Oxford Associates, Advance Mortgage Corp., Milligan-Reynolds Guaranty Title Agency, Inc., pp. 7-8.

upon removal "is, in a limited sense, a derivative jurisdiction" and that "[i]f the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." See 1A J. Moore, *Federal Practice*, para. 0.157[3] (2d ed., 1974), and cases discussed therein. Lack of the requisite injury-in-fact necessary for standing is a jurisdictional defect under Tennessee law (see *Badgett* v. *Rogers*, 222 Tenn. 374, 436 S.W. 2d 292), as well as federal law (see *Warth* v. *Seldin*, 422 U.S. 490, 498-499). Accordingly, the courts below correctly concluded that whether the district court had jurisdiction depended upon whether petitioners had standing in the Tennessee Chancery Court under state law.[3]

2. The courts below correctly determined that petitioners lacked standing under Tennessee law. As the Tennessee Supreme Court stated in *Badgett* v. *Rogers*, *supra*, 222 Tenn. at 379, 436 S.W. 2d at 294:

> As a general rule of long standing in Tennessee, individual citizens and taxpayers may not interfere with, restrain or direct official acts, when such citizens fail to allege and prove damages or injuries to themselves different in character or kind from those sustained by the public at large.

The allegations made by petitioners do not satisfy this general test. Petitioner Moccasin Bend Association originally alleged only that it was concerned with preservation of historic and scenic landmarks, including those

---

[3]Petitioners also contend (Pet. 28-31) that the district court erred by not allowing them to amend their complaint or, alternatively, not remanding the case to the state court for consideration of the motion to amend. As *Lambert* makes plain, however, the decisive question upon removal of an action is whether the state court had jurisdiction before removal. An amendment offered subsequent to removal cannot cure a jurisdictional defect that existed prior to removal.

located within the Cameron Hill project (Pet. App. A6; C.A. App. 6a). The Association unsuccessfully sought to amend the complaint to allege additionally that its members had used the park that had been located on Cameron Hill prior to urban renewal (C.A. App. 39a). But these interests are no different than those that might be asserted by the public at large, and petitioners concede (Pet. 17) that the Tennessee Supreme Court specifically held in earlier litigation that the Association lacked standing to challenge previous urban renewal activity on Cameron Hill which destroyed the park. The three individual petitioners asserted an interest as taxpayers, but only petitioner Wamp was shown to pay property taxes in Chattanooga (Pet. App. A6). And any effect on his taxes attributable to the Cameron Hill project is not special, but is similar to the effect, if any, on all other taxpayers in the city (Pet. App. A7; Tr. 122, 133).[4] Finally, petitioner Wamp alleged that if the Cameron Hill project were reopened for bidding he would submit a bid for the project (C.A. App. 21a; Tr. 289-290). Wamp admitted, however, that he had chosen not to participate in the original bidding for the Cameron Hill project (Tr. 280-281). Thus, petitioners failed to allege special injury of a type satisfying Tennessee's general rule of standing to challenge official actions.

The Tennessee Supreme Court recognizes two exceptions to its general standing rule, covering situations in which "it is asserted that the assessment or levy of a tax is illegal or that public funds are misused or unlawfully diverted from stated purposes." *Badgett* v. *Rogers*, *supra*, 222 Tenn. at 380, 436 S.W. 2d at 294. But as the courts below correctly concluded (*e.g.*, Pet. App. A9-A12), petitioners' claims do not fall within either exception. While petitioners contend (Pet. 20-21) that another exception should be made

---

[4] "Tr." refers to the transcript of proceedings in the district court.

for alleged misuse of public property, the Tennessee courts have not recognized any such exception. Cf. *Walldorf* v. *City of Chattanooga*, 192 Tenn. 86, 237 S.W. 2d 939. Thus, petitioners lacked standing under Tennessee law.

3. Petitioners also lacked standing under federal law. Petitioner Moccasin Bend Association did not allege, in either the original or proposed amended complaint, that its members will be specifically and adversely affected by the Cameron Hill housing project, which occupies only a part of the Cameron Hill site. Cf. *Sierra Club* v. *Morton*, 405 U.S. 727. A new park will occupy another portion of the site (Pet. 12). Furthermore, none of the individual plaintiffs alleged a "logical nexus" between his status as a taxpayer and his opposition to the housing project. See *United States* v. *Richardson*, 418 U.S. 166; *Schlesinger* v. *Reservists Comittee to Stop the War*, 418 U.S. 208. Finally, petitioner Wamp's asserted interest in submitting a proposal for redeveloping the Cameron Hill site, after having failed earlier to submit a proposal, is too tenuous and speculative an interest to give him standing. Cf. *Warth* v. *Seldin*, *supra*, 422 U.S. at 514-517.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

ROBERT E. KOPP,
ANTHONY J. STEINMEYER,
Attorneys.

MAY 1976.

DOJ-1976-05